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By

JAS.

*The Begun 7th of June*

# REPORTS OF CASES

499

IN LAW AND EQUITY, ARGUED AND  
DETERMINED IN THE

## SUPREME COURT OF GEORGIA,

AT ATLANTA.

Parts of February and September  
Terms, 1880.

~~No. ———~~  
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# JUDGES AND OFFICERS OF THE SUPREME COURT OF GEORGIA

DURING THE PERIOD OF THESE REPORTS.

HON. HIRAM WARNER, Chief Justice,	Greenville.
HON. JAMES JACKSON, Chief Justice,†	Macon.
HON. JAMES JACKSON, Associate Justice,	"
HON. MARTIN J. CRAWFORD, Associate Justice,	Columbus.
HON. WILLIS A. HAWKINS,*	Americus.
HON. ALEXANDER M. SPEER, Associate Justice,‡	Griffin.
HENRY JACKSON, Reporter,	Atlanta..
J. H. LUMPKIN, Assistant Reporter,	"
Z. D. HARRISON, Clerk,	"

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COWETA, . . . . .	HON. HUGH BUCHANAN, . . .	Newnan.
" . . . . .	HON. F. M. LONGLEY,¶ . . .	LaGrange.
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CLARK COUNTY . . . . .	HON. HOWELL COBB, . . . .	Athens.
SAVANNAH, . . . . .	HON. WILLIAM D. HARDEN, . .	Savannah.

††Chief Justice Warner having resigned, Justice Jackson was appointed by the Governor to succeed him. Hon Willis A. Hawkins was appointed to succeed Justice Jackson. At the election by the General Assembly in November, 1880, to fill these unexpired terms, together with that of Justice Bleckley, to whose seat Justice Crawford had been appointed, Chief Justice Jackson was re-elected, and Justice Crawford and Hon. A. M. Speer were elected Associate Justices. Justice Hawkins was not a candidate.

‡Judge Buchanan having resigned, Hon. F. M. Longley was appointed to succeed him. He qualified Nov. 19, 1880.

¶Judge Speer having been elected to the supreme bench, Hon. Jno. D. Stewart was elected to succeed him. He qualified Nov. 23, 1880.

§Judge Johnson having died, Hon. R. W. Carswell was appointed to succeed him. He qualified Sept. 23, 1880.

## NOTE.

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By act of 1866 (section 4270 of the Code), the decisions of the supreme court are required to be announced by written synopses of the points decided. The decisions thus announced are published as the opinions of the Justices delivering them, the head-notes being made by the reporters.

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# CASES ARGUED AND DETERMINED

IN THE

## Supreme Court of Georgia,

AT ATLANTA.

-----  
FEBRUARY TERM, 1880.

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PRESENT—HIRAM WARNER, . . . . CHIEF JUSTICE.  
JAMES JACKSON, . . . . ASSOCIATE "  
MARTIN J. CRAWFORD, . . . . " "

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PORTER & MUMFORD vs. GORMAN.

1. Where action was brought for breach of covenant, and a recovery is sought upon an alleged agreement not found therein, the plaintiffs must allege that such was the real contract, that the omission was caused by fraud, accident or mistake, and that one or both parties intended its insertion.
2. When a business is sold, a stipulation is necessary to prevent the seller from carrying on the same occupation in that town; but the mere purchase of the "good will" will not compel such result.

Covenant. Contracts. Pleadings. Sales. "Good-will."  
Before Judge CRAWFORD. Talbot Superior Court. September Term, 1879.

Reported in the decision.

WILLIS & WILLIS; J. H. MARTIN; J. F. POUL, for plaintiffs in error.

W. A. LITTLE, for defendant.

CRAWFORD, Justice.

This was a suit against the defendant for a breach of covenant arising upon a deed conveying to the plaintiffs "all the printing press and presses, type, printing material, chases, cases, stands, fixtures, and all appurtenances thereto belonging, together with the good-will of the Talbotton *Standard* newspaper," and not a bill in equity nor an equitable proceeding at law to reform a written contract.

The plaintiffs alleged that the good-will of the paper was worth \$1,200.00, and so estimated in the trade, and that in consideration thereof it was further agreed by the defendant, and he promised that he would not put up and carry on another paper in the town of Talbotton, yet on the first day of January, 1877, the said defendant established another paper and reduced their rates to one-half of what they were before, thereby injuring them \$1,500.00. The defendant demurred to this declaration, which demurrer was sustained by the court, and the plaintiffs amended by alleging "that at the time plaintiffs purchased, defendant *said* that he meant by 'good will' that he could not put up another printing press in Talbotton, and relying upon said representation and warrant that he would not put up another press in Talbotton, the same was left out of the agreement." "And it was expressly understood between said parties that said Gorman would never again engage in the newspaper business in Talbotton, and it was not put in because it was agreed and understood that it was not necessary, as he would not and could not, under said covenant, put up another printing press in Talbotton."

The defendant demurred to the declaration as amended, and upon the argument of the demurrer the covenant itself was read and commented on by the counsel of the parties. The court held "that if the plaintiffs desired to introduce evidence under the declaration as amended, to add to the

covenant a new feature or obligation that the defendant was never to engage in the newspaper business again in Talbotton, they must allege that *that was the contract*, and that it was left out by fraud, accident or mistake, and that one or both intended its insertion. That without some such allegation this covenant could not be extended to cover a new stipulation of that sort not in the writing. That if the deed did not speak the bargain it could be made to do so by having it reformed, but that without some legal reason shown for it, a new condition could not be engrafted upon the written contract." No further amendments were offered to bring the plaintiffs within the legal rule required by the court, that there must be some allegation either of fraud, accident, or mistake before a covenant, or indeed any written contract, can be added to changing its terms. This ruling of the court was thereupon excepted to and assigned as error.

A close examination of the declaration and its amendments will show, first, that although brought on a *covenant*, for a *breach thereof*, yet the breach alleged was upon a promise and an agreement not found therein, but alleged to have been made contemporaneously therewith; and second, upon the ground that the "good-will" stated in the covenant carried with it the obligation not to establish another paper in Talbotton.

1. The deed defines and specifies the sale of the printing press, type, etc., and all the appurtenances, together with the good-will of the Talbotton *Standard* newspaper, and concludes with the words, "I do for myself and heirs, executors and administrators, hereby covenant and agree to warrant and defend the said property to the said Porter & Mumford, their heirs, etc., against the lawful claims and demands of all persons whatsoever."

It is not asserted that this deed does not express the contract as made and accepted by the plaintiffs; if it does not, the mistake, the accident, or the fraud, should be alleged, proven, set up and enforced. It has been ruled

by this court, that even an allegation that the parol promise was with the intent to defraud is insufficient, unless left out by mistake or fraud, to authorise the introduction of parol proof to change the contract as written. 52 Ga., 149.

To allow parol evidence to contradict or vary a written contract, it must be alleged that there was fraud, accident or mistake in the written contract, how the mistake occurred, or fraud was committed, and that one or both intended its insertion. 56 Ga., 31 and 32. The averments thereof must be *full* and *explicit*. 60 Ga., 159. It must further appear in what it *consisted*. 59 Ga., 850. We see no reason why, if the facts warrant the allegation in this case, that the deed may not be made to speak the real bargain and then be enforced. 57 Ga., 319.

2. Good-will is defined by Lord Eldon to be "nothing more than the probability that the old customers will resort to the old place." No subsequent definition has changed in any material respect this rendition, and all the writers seem to have recognized and adopted it. See Bouvier's Law Dictionary, title "Good-will;" Coll. on Partnership, 1, 149 and note; Story on Partnership, §99. Do, therefore, these words stated in the covenant carry with them the obligation not to establish another paper in the same town? They carry nothing but the good will of the Talbotton *Standard*, and the probability that its customers will continue their patronage in the future as in the past.

A stipulation is necessary to prevent the party from carrying on the same business, and when the contract is guarded by such stipulation it will be enforced, but the mere purchase of the good-will simply is insufficient to restrict a party in the enjoyment of a right which he has not bargained away. See Addison on Contracts, vol 1, p. 412; 14th Vesey R., 469; 17 Vesey, 334-346.

Judgment affirmed.

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Frost vs. Render.

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## FROST vs. RENDER.

1. A sheriff sells, and a purchaser at his sale buys, according to the process and levy thereunder. A levy being on certain land as the property of defendant in *fi. fa.*, a sale under such levy carries with it the crop growing on the land, and the sheriff cannot limit the sale by an announcement that the rent of the current year is reserved.
2. Heirs-at-law cannot make a settlement with one creditor of the estate so as to limit the estate of the decedent in property to be conveyed by a sale under a judgment which was rendered in his life-time.
3. The verdict is supported by the evidence.

Levy and sale. Sheriff. Title. Contracts. Estate. Debtor and creditor. Before Judge BUCHANAN. Troup Superior Court. November Term, 1879.

The following, taken in connection with the decision, sufficiently reports this case :

Jesse McClendon, deceased, was the common debtor. There were various *fi. fas.* against him, one in favor of Wilson, Callaway & Co., held by Ferrell and Park, transferees ; another in favor of Frost ; two others in favor of Thornton, administrator, held by Frost and Crenshaw, transferees. All these were levied on certain land as the property of defendant in *fi. fas.* He having died, his widow and children, as heirs-at-law, interposed a claim as against Frost. The latter also has pending in court a suit against Jesse McClendon. He and the heirs entered into the following agreement :

“ GEORGIA—Troup County.

“ Whereas there is a controversy now pending between F. A. Frost, as plaintiff, and Jesse McClendon, defendant, and Martha G. McClendon and Ella and Mattie McClendon, claimants of 650 acres of land one mile east of LaGrange, lying in one body, and known as the Wammack place, and adjoining lands of estates of J. D. Newman, O. A. Bull, Mrs. Ragland, G. Kener and Mrs. Ware ; and whereas said *fi. fas.* are levied on this as well as other property, all of which is claimed by the above claimants : Now, in consideration that said claimants



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Frost vs. Render.

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withdraw their said claim, and allow said Frost to proceed against said property, the said Frost agrees to buy in said Wammack place, or to receive the proceeds of the same; and the said claimants also agree to pay said Frost \$1,000.00 on or by the first Tuesday in August next, and also to turn over to said Frost the rent contracts for eighteen bales of cotton from said Wammack place for the present year. The said Frost, on his part, agrees to transfer all of his *fi. fas.* against Jesse McClendon to Miss Ella McClendon and Mattie McClendon, reserving the right to have the use of said *fi. fas.* to sell any parcel of land heretofore sold off of said Wammack place by said Jesse McClendon, and which may be subject to said *fi. fas.*, this being the only interest said Frost will have in said *fi. fas.*, after he shall first have received the Wammack place, rent notes for the eighteen bales of cotton, and the \$1,000.00. The *fi. fas.* referred to are two *fi. fas.* in favor of J. P. Thornton, administrator of T. J. Thornton, vs. Jesse McClendon and another, and the *fi. fas.* of F. A. Frost vs. Jesse McClendon. The said Frost also agrees, for said consideration, to settle all other claims or demands he has against said Jesse McClendon.

*LaGrange, Ga., July 1st, 1879.*

(Signed)

FERRELL & LONGLEY,

*Attorneys for F. A. Frost.*

J. S. BOYNTON & A. H. COX,

*Claimants' Attorneys.*

The claimants turned over to Frost the rent notes of tenants on the land.

The land went to sale, and Render became the purchaser. The tenants attorned to Render, and gave him also rent notes. These tenants then filed their bill to cause Render and Frost to interplead in regard to the rent. They did so, and after verdict against Frost, he moved for a new trial, which being refused, he excepted.

FERRELL & LONGLEY ; A. H. COX, for plaintiff in error.

THOS. H. WHITAKER ; B. H. BIGHAM ; GEO. L. PEAVY, for defendant.

JACKSON, Justice.

This was a bill of interpleader, filed by the tenants on a plantation which belonged to a decedent by the name of

McClendon, against Frost and Render, setting out that they owed rent for the place in the shape of certain bales of cotton, part of the crop made thereon, which was claimed by the two defendants to be due and payable to each of them, and that complainants were ready to turn it over to either, but did not know to whom, and therefore prayed that the defendants interplead and the court settle the controversy.

Thereupon defendants interpleaded, and under the instructions of the court the jury found for Render, and a decree was had that the rent be paid to him. Thereupon Frost made a motion for a new trial, it was overruled, and he excepted.

The facts are that the land was levied on as the property of Jesse McClendon, and was sold by the sheriff when Render bought it on the first Tuesday in August, 1879, these tenants and complainants having rented it from certain claimants who were, it seems, heirs-at-law of Jesse McClendon, and had made an agreement with Frost, one of the plaintiffs in execution, to withdraw their claim and let the land sell upon certain terms specified therein. These claimants, pursuant to this agreement, had turned over the rent notes for eighteen bales of cotton, the price of the rent of the land, to Frost; and Frost rested his claim to the cotton in dispute on this agreement and whatever title it gave him. Render, on the other hand, claimed the rent because the growing crop went with the land at the sheriff's sale, and to avoid being dispossessed, the tenants attorned to him, recognized him as landlord under the sheriff's title, and gave him new rent notes for the cotton in dispute. The agreement which Frost made was to the effect that he was to bid off the place or receive the proceeds, the heirs to pay him \$1,000.00 on sale day in August, and turn over the rent notes to him, and he to have the use of the executions to levy on other lands sold off by McClendon while in life, and reserving no other interest; then the title to his McClendon *fi. fas.*

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Frost vs. Render.

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was to go to these heirs, who were contesting in the claim case with him for this land.

The motion for a new trial was based on the following grounds:

1. Because the court erred in rejecting the testimony of B. C. Ferrell to the effect that on the day of the sale under the *fi. fas.* of Frost, and Callaway & Co., Frost caused the sheriff to announce publicly, when he sold the land, that the rent for the present year was reserved to said Frost, the purchaser of the rent notes, and that the sheriff was selling the land only and not the rent.

2. Because the court erred in ruling out the following testimony of Longley: "I was present on the first Tuesday in August last, when the Wammack place was sold by the sheriff. Frost requested me to give notice that he held the rent notes of the tenants for the rent of the Wammack place for the year 1879. I, therefore, went to the sheriff and told him the rent was reserved and to make the announcement. The sheriff thereupon gave the notice that the rent of said place was reserved, and after the notice bidding went on by Frost and Render, until the property was knocked off to Render for \$4,875.00." After said testimony was given the court, on motion of Render's counsel, ruled out all of said testimony in relation to the notice, holding the testimony irrelevant.

3. Because the court erred in refusing to allow Frost to introduce the declaration of F. A. Frost vs. Jesse McClendon, an action pending in Troup superior court for \$5,000.00, and which was settled by the agreement of Frost and the McClendon heirs—the object of said evidence being to show that said action was pending, and that the same was so settled by said agreement.

4. Because the verdict and decree are contrary to law.

1. In our judgment the first and second grounds were properly overruled. The sheriff sells according to the process put into his hands and his levy thereunder. The purchaser buys whatever the law gives him under that

process and levy, and the levy being on the decedent's land as his property, whatever was growing on the land went with it. This cotton was growing on it and went with it; and the sheriff's notice could not limit the sale. Purchasers bought what was levied on and advertised for sale, and the law fixed what that was, and the growing crop passes with the land levied on and sold by the sheriff. Code, §3642. The case of *Ferguson vs. Hardy et al., adm'rs.*, reported in 59 *Ga.*, 758, decides that where rented land upon which there is a growing crop was sold under an execution against the landlord, and the tenant evicted, the consideration of the rent note fails; and where the purchaser entered and the tenant attorned, the right to collect the rent is in the purchaser. The principle there ruled covers this case. The fact that the heirs of McClendon rented to the tenants, and not the decedent himself, makes the case stronger for the purchaser. It is difficult to see how the heirs could divest the lien of a judgment on the land of their ancestor, or modify that lien and contract the extent thereof. When they withdrew their claim and the property was sold as the ancestor's, it was sold without regard to any claim or contract of theirs, and the law fixed what was sold and what passed to the purchaser, and that was just what McClendon's property or estate in the land was, and that was the fee, and all its incidents and appurtenances.

2. We are at a loss to understand how any suit between Frost and McClendon for \$5,000.00, claimed to be due to the former by the latter, could affect the sheriff's sale under the *fi. fas.* of Frost and Callaway & Co. We are at greater loss to comprehend how the heirs at law could have settled such litigation at all. That would devolve upon the legal representative of the estate of Jesse McClendon. Nor can we see how an arrangement of one creditor of an estate with the heirs at law of the decedent could legally operate to limit the estate of the decedent, in property bound by a lien, as against a judgment credi-

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*Walker vs. Banks et al.*

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tor whose lien attached in the lifetime of the defendant in execution. There was certainly no error in ruling out the declaration, etc., as set out in the third ground of the motion.

3. The verdict and decree are not against law, but demanded by the law and the evidence. The truth seems to be that Frost is paid all the heirs promised him, except what they had no right to promise, the rent of their father's land, when it was covered by the lien of judgments; and that he complied with his agreement with them seems, to say the least, uncertain. He failed *to buy in the land*, because Render outbid him, perhaps, but he received the proceeds, and got all the benefit of the contract he made with the heirs which the law gave him. However that may be, it is a question between him and them. Render bought this land at sheriff's sale, the growing crop passed with the title the sheriff made him, and the heirs could make no contract with one of the creditors in judgment or not, so as to affect the judgment lien of another creditor, and the purchaser under it.

See further cited by defendant in error: Code, §§3640-1-2-3, 2619; 8 *Ga.*, 240, 300; 9 *Wheaton*, 616; 11 *Ga.*, 427; 10 *Ib.*, 568; 23 *Ib.*, 168; 6 *Ib.*, 452; 3 *Ib.*, 110; Code, §§2624, 3624, 3651. The plaintiff in error furnished no brief.

Judgment affirmed.

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WALKER vs. BANKS et al.

1. A bill of exceptions which assigns error in the judgment complained of on the ground that the court had no jurisdiction to render it, will not be dismissed as excepting to a nullity.
2. The judge of the superior court cannot pass upon a motion for new trial in vacation without an order for that purpose passed in term time; and if the order designates the time and place of hearing, the power is restricted thereto, unless the hearing be continued for good cause then and there shown.

Practice in the Supreme Court. Jurisdiction. Practice in the Superior Court. New trial. Before Judge SPEER. Monroe Superior Court. August Term, 1879.

Reported in the decision.

BERNER & TURNER, for plaintiff in error.

A. D. HAMMOND, by JNO. I. HALL, for defendants.

JACKSON, Justice.

A motion was made for a new trial of this issue of fact, which was granted, and Walker, against whom it was granted, excepted to the judgment granting the new trial, on the ground, among others, that the court had no power to grant the new trial at the time and place when and where it was done. A motion was made to dismiss the bill of exceptions by defendant in error, on the ground, too, of want of power or jurisdiction in the court, because the grant of the new trial was a nullity, and left the motion undecided and pending; and these two questions will be passed upon by us: first, ought the bill of exceptions, or writ of error, to be dismissed? and, secondly, if not, must the judgment granting the new trial be reversed for want of jurisdiction then and there to grant it?

The facts are these: An order was taken to hear the motion for a new trial during Butts superior court, at Jackson, at chambers; it was not heard, no action continuing or otherwise disposing of the case was then and there taken; but at Griffin, some time thereafter, the motion was heard, and the new trial was granted at chambers, neither plaintiff nor defendant being present. In certifying the bill of exceptions, his Honor, Judge Speer, says that he was under the impression that an order was taken allowing him to pass on the motion at chambers generally, and that, if the record does not show such an order, he was misinformed—without, however, imputing fault to counsel on either side.

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Walker vs. Banks et al.

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On examining the record, the following order alone appears in respect to this and other cases, after stating them :

" It is agreed by the parties, and ordered by the court, that the above cases be heard at Jackson during the term of the superior court, in chambers, and that this order be entered on the minutes of this court.

" August Term, 1879.

ALEX. M. SPEER,

J. S. C. F. C."

1. The bill of exception will not be dismissed. It was the duty of the movant for the new trial to press his motion at the time and place agreed upon and designated in the order, or to move for a continuance to another time and place; and to permit him to dismiss the writ of error would be, first, to allow him to take advantage of his own negligence, and, next, to deprive the other party of the clear legal right he possessed of excepting to a judgment which was illegal because rendered without jurisdiction, and having it reversed. It is true that it is a mere nullity, but so is every judgment upholding pleas to the jurisdiction where the court has none, and the injured party can except in the former as in the latter case, and have the illegal judgment reversed, whether attacked for want of jurisdiction or for any other legal reason.

2. The judgment must be reversed. There was no court to grant it. The judge had no power to do so. Without an order for that purpose during term, he cannot hear a motion for a new trial at chambers; and if the order in term designates the time and place, the power is restricted to that time and place, unless continued for good cause then and there shown. Code, §249.

Judgment reversed.

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Strange, administrator, *et al.* vs. Barrow *et al.*, executors.

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STRANGE, administrator, vs. BARROW *et al.*, executors.

1. The execution of a paper which is the foundation of the action, need not be proven to authorize its admission in evidence, in the absence of a plea of *non est factum*.
2. To authorize the establishment of a copy of an amendment to the declaration alleged to have been filed at a previous term, neither an entry upon the bench docket nor an order upon the minutes is absolutely necessary. There is no necessity for any action of the judge on an amendment except where the rights of the opposite party are to be affected by the negligence of the amending party. Hence, evidence other than that upon the records of the court may be considered by the judge upon the proposition to establish a copy.

Contracts. *Non est factum*. Lost papers. Evidence. Before E. M. BUTT, Esq., Judge *pro hac vice*. Schley Superior Court. October Term, 1878.

Reported in the opinion.

W. A. HAWKINS; COOK & HOLLIS, for plaintiffs in error.

GUERRY & SON; B. B. HINTON; W. J. WALL, for defendants.

CRAWFORD, Justice.

The plaintiffs in error brought their action of complaint against the defendants to recover upon the following contract:

"STATE OF GEORGIA—Schley County.

"Agreement made and entered into this day—Shadrich Wall of one part and Shadrich Drew of the other part, both of said county and state—S. Wall hath this day paid the said S. Drew one thousand dollars, for which he is to live on the Collum place during my life-time, be it long or short; and he is to attend faithfully to all my plantation business, and all ordinary business, such as weighing out, paying, col-



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Strange, administrator, *et al. vs.* Barrow *et al.*, executors.

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lecting; and he is not to remove from the said Collum place during my life-time.

"Hereunto we have set our hands and affixed our seals.

his  
SHADRICH X WALL. (Seal).  
mark.

SHADRICH W. DREW. (Seal.)

"Witness: J. S. BURKE.

"The condition of the above obligation is such that if either should fail to comply with the above obligation it is to be null and void or remain in full force and virtue."

After reading the declaration to the jury, plaintiffs offered in evidence the foregoing contract, to which objection was made unless the execution was proven by the subscribing witness, the court sustained the objection. The plaintiffs then offered to establish an amendment which they claimed had been lost since the preceding term, when the same had been made and allowed by the court. Testimony was admitted showing that the amendment was allowed by the judge presiding at that time; that the clerk saw the attorney writing it out, and read a few lines of it, but does not remember whether the judge signed the order granting the same. No entry appeared on the bench docket, nor order on the minutes allowing the amendment. The court refused to allow the amendment, and, upon motion of defendants' counsel, awarded a non-suit.

The two errors complained of are the rejection of the contract and the refusal to allow the amendment established.

1. It is true that the general rule of law is, that where there is a subscribing witness to a paper he must be produced and prove the execution before it is admissible; but in cases where *it is the foundation of the action*, then the rule changes and the subscribing witness is not necessary unless the same is denied under oath. This contract was declared on, it was the foundation of the plaintiffs' suit, and not being denied on oath of the defendant there

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*Strange, administrator, et al. vs. Barrow et al., executors.*

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was error in the court in not allowing it to be introduced in evidence.

2. The plaintiffs endeavored to establish a lost amendment, which was refused for the want of an entry upon the bench docket, or an order on the minutes granting the same. Amendments are to be allowed as a matter of right at any stage of the cause, in form or substance, and independently of any action of the judge as to its exercise, except in cases of negligence, when reasonable and equitable terms may be enforced. This was not a motion to amend at that time, but to establish one which was lost. We are not authorized to say what shall or shall not be sufficient evidence to satisfy the judge that an office paper existed and has been lost, but we do not think, under the broad and liberal rule upon that subject, that either an entry upon the bench docket or an order on the minutes are the only methods of showing that an amendment existed and was filed.

Our construction of the law is, that there is no necessity for any action of the judge, except where the rights of the opposite party are to be affected by the negligence of the amending party. Hence, an amendment may be filed at the first term, and a copy served without leave from the judge, and no question of terms arises, and so after a case has been continued. But if offered at the trial term, or at any time when the question of negligence affects the rights of the opposite party, the judge may impose terms.

Holding, therefore, the rulings to be wrong, the judgment must be reversed.

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Smith, governor, for use, *vs.* Banks *et al.*

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SMITH, governor, for use, *vs.* BANKS *et al.*

1. The evidence being sufficient to sustain the verdict under the law as ruled by this court when this case was here before, 60 *Ga.*, 643, the refusal of the court to grant a new trial will not be controlled.
2. Jurors cannot impeach their verdict; much less will it be set aside on the affidavit of the party for whose use the case is proceeding, that some of the jurors told him that it was caused by mistake.

New trial. Jury. Verdict. . Before Judge SPEER.  
Newton Superior Court. September Term, 1879.

Smith, governor, for the use of Lee, brought debt against Banks, who was sheriff of the county of Newton for the years 1871 and 1872, and the securities on his official bond, alleging as a breach, that his deputy had failed to levy two executions against one Berry, which had been transferred to Lee, on certain lands, as he had been directed to do, by which failure the lien was lost, etc. The defendants pleaded the general issue, that if instructions to levy were ever given the deputy sheriff they were immediately revoked, and that the land was not subject to the executions when the instructions were given.

The plaintiff introduced in evidence the bond sued on, two judgments rendered December 23d, 1861, in favor of Carey W. Berry *vs.* Isham H. Berry, the *fi. fas.* based thereon with transfers to Lee, deed from Glass to Isham H. Berry, made October 30th, 1856, conveying certain land, deed from Berry to Bailey made in September, 1862, covering same property, and the record of the September adjourned term, 1876, of Newton superior court, showing verdicts in favor of claimant in his two cases of Lee, transferree, *vs.* Isham H. Berry, defendant in *fi. fa.*, and M. E. Berry, claimant.

Bailey testified to the following facts: Purchased the land in 1862 from Isham H. Berry, in good faith, without notice, and took a deed, which has since been lost. It

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Smith, governor, for use, vs. Banks *et al.*

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was worth in 1871-2, \$1,500.00 to \$2,000.00. Conversed with Lee frequently from close of war to 1873: he mentioned that he had executions against Berry, but was not going to push them against the land further than to protect himself on what was known as the Glass or Henderson *fi. fa.*

Isham H. Berry testified to his insolvency, and that the land referred to was worth in 1871-2, \$2,500.00.

Lee testified to the following facts: About the middle of November, 1871, he placed the two Berry *fi. fas.* in the hands of Charles A. Dorsett, deputy sheriff, with instructions to levy at once upon the land then in possession of Bailey. The executions were handed to Dorsett in the clerk's office in the presence of Lindsey, clerk. Dorsett promised to make the levy. When witness came to town, which was every few days, he would ask Dorsett if he had made the levy. Such instructions were given to him five or six times. About January 1st, 1872, Dorsett told him that the land had been set apart as a homestead, and he would not levy unless witness would make affidavit that the *fi. fas.* were for the purchase money thereof. Replied that he could not make such affidavit, but would give him any kind of a bond he required. Saw him again about the 1st of February, and insisted that he should make the levy. He still refused and requested that witness should go with him to Judge Floyd's office for advice. Went to Floyd's office and while the latter was writing out the advertisement under the Glass *fi. fa.*, witness again asked Dorsett whether he intended to levy the Berry *fi. fas.* He replied that he would not levy unless the affidavit as to purchase money was made. This witness said he could not do. Dorsett then threw the Berry *fi. fas.* on Floyd's table, said he would have nothing more to do with them and started out of the door. Witness picked up the executions, placed them in his pocket, and as he left Floyd's office, abused Dorsett quite severely. A few days thereafter witness saw Banks, the sheriff, and asked

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Smith, governor, for use, *vs.* Banks *et al.*

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him if he would not levy the executions. He replied that he had given all business of that nature to Dorsett. Land was worth in 1871-2 about \$2,500.00. There was then due upon the Glass *fi. fa.* about \$1,200.00 or \$1,300.00, and upon the Berry *fi. fas.* about \$800.00 or \$900.00. The land, if sold, would have paid them all off. Witness never did acquiesce in the surrender to him of the executions in Floyd's office.

The evidence of Lindsey, the former clerk, was very vague and indefinite. He remembered that some time in 1871 or 1872, Lee told him that he had discovered that certain *fi. fas.* against Berry were not dormant, and he wanted them levied, or an old levy already made proceeded on. Some conversation with Dorsett of this import was had in his office and in the sheriff's, but whether reference was had to the Glass *fi. fa.* or the Berry *fi. fas.* he is unable to state.

The defendants introduced the following evidence:

1. Execution in favor of Glass *vs.* Berry, based on judgment rendered October 1st, 1858, for \$2,275.00 principal, and \$96.00 interest to date of judgment, with credits thereon to January 5th, 1861, amounting to \$1,760.01, and with credit of \$32.85 on January 6th, 1874. On this paper was a transfer to Isaac P. Henderson.

2. Dorsett testified as follows: Executions were placed in his hands by Lee in 1871. Ascertained that property had been set apart as homestead, and informed Lee that he would not levy unless affidavit was made that executions were for purchase money thereof. The next evening Lee asked witness if he had been out to Bailey's. Replied that he had not; whereupon Lee said he was glad of it, and requested witness to go with him to Judge Floyd's office. Floyd advised Lee not to levy either *fi. fa.* Witness did not levy any of the *fi. fas.*, but advertised the land under a levy made on one by a former sheriff. Lee asked witness for the other two *fi. fas.* Turned two over to Lee, retaining the one which had been levied.

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Smith, governor, for use, vs. Banks et al.

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Did nothing with the other two because they were taken out of witness' hands. No other request was ever made to levy.

Banks swore that the Berry *fi. fas.* were never in his hands during his term of office as sheriff, and that Lee never came to him because Dorsett, his deputy, refused to levy them; that Lee did place the Glass *fi. fa.* in his hands, and this he turned over to Dorsett with instructions to levy.

Anderson, the successor of Banks as sheriff, testified that he had a conversation with Lee about the Berry *fi. fas.* sometime in 1873 or 1874; that he asked him to look in the sheriff's office to see if he could find them, as he, Lee, had lost or mislaid them; that he said if he could find them he thought he could make his money; that he made search but was unsuccessful.

Bower, being shown following entry on each of the *fi. fas.*: "I know of no property upon which to levy the within *fi. fa.* except property set apart as a homestead, upon which I am forbidden to levy under the homestead law. September 8th, 1869. (Signed) G. M. T. Bower, sheriff," testified as follows: Entries were made at Lee's request. He said he had executions about to go out of date and there was no property subject except Bailey's land, which he did not wish to disturb, but wanted entries made merely to keep them in life. He was afraid to levy and so was witness. Witness wrote out the notice served on him and Lee signed it. Judge Floyd dictated the language of the entries.

The jury found for the defendants. The plaintiff made a motion for a new trial upon the following, among other grounds:

1. Because the verdict was contrary to evidence, law and the principles of justice and equity.
2. Because the verdict was contrary to the charge.
3. Because the verdict of the jury was the result of mistake.

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Smith, governor, for use, vs. Banks et al.

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In support of the last ground Lee filed his affidavit to the following effect :

Since the rendition of the verdict, and shortly thereafter, two of the jurors, Vandergriff and Hyatt, informed deponent that after the jury went to their room, they decided that the sheriff, Banks, was liable for the failure of his deputy, Dorsett, to levy the Berry *fi. fas.*; that they then proceeded to calculate the amount due on the Glass *fi. fa.* in order to determine the extent of the sheriff's liability; that they fixed the value of the Bailey land at \$2,000.00; that they found the value of the land not more than sufficient to satisfy the amount due on said *fi. fa.*; that Hyatt called the attention of the jury to the fact that Edwards, one of plaintiff's counsel, had referred to a credit of \$800.00 on that *fi. fa.*, and he thought it must be there, but the jury could not find it; that Vandergriff objected to the result of the calculation, and said that there certainly must be some mistake as there were more credits than they had found, and that he knew Lee would not have brought the suit if the land had not been more than sufficient to satisfy the Glass *fi. fa.*

The defendants introduced the affidavit of one of the jury, Boggus, who swore that the verdict was based on the testimony of Dorsett as to his having returned the Berry executions to Lee at his request.

The motion was overruled, and plaintiff excepted.

E. F. EDWARDS; CAPERS DICKSON; EMMETT WOMACK, for plaintiff in error.

CLARK & PACE, for defendants.

JACKSON, Justice.

This suit was brought on a sheriff's bond against the sheriff of Newton county and his sureties for breach of the bond in failing to levy, when directed to do so, the

executions of plaintiff on the property of the defendant in execution.

When here before, as reported in 60 *Ga.*, 643, the case was sent back for a new trial because the verdict of the jury might have been made on the excuse of the sheriff for not levying because of a homestead claim set up by him, when the debt on which the judgment was founded was contracted prior to the constitution of 1868; and the case was sent back because of error on that point, and also because the sheriff did not prove that there was a homestead legally set apart, the burden being upon him to make that proof. But it was there ruled distinctly that if the order to levy was revoked, and so found to be by the jury, the sheriff would be discharged, and *a fortiori* would his sureties also be discharged. On the last trial, now brought here for review, the testimony was conflicting on that point, the deputy sheriff testifying that it was revoked, and the plaintiff the contrary.

The jury believed the testimony of the deputy sheriff, as they had a legal right to do, and found the evidence to be in favor of the allegation that the order to levy was revoked and the executions taken possession of by the plaintiff. The evidence being sufficient to sustain the verdict, this court will not overrule the court below in refusing to disturb the verdict on the ground that it is against the evidence and against law. No complaint is made of the charge, but the exceptions are that the verdict is against the law and the evidence.

2. The jurors cannot themselves attack their own verdict; much less can the affidavit of the party that some of them told him that the verdict was caused by mistake authorize a new trial.

Judgment affirmed.



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*Waters et al., executors, vs. Perkins.*

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WATERS *et al.*, executors, *vs.* PERKINS.

1. If a defendant has a legal defense to an action at law, he must **then** make it, or he will be concluded; and equity will not relieve him **un-**less he failed to make the defense by the fraud of the other party, **or** by accident, and without fault in himself. But where the defense is equitable, and requires the introduction of new parties, the defendant will not be concluded by his failure to plead it to the action at law. He may assert the same by bill in equity after judgment.
2. The general rule in considering a demurrer to a bill in equity is to look only at the bill and exhibits. When, therefore, a general demurrer was filed, considered and overruled on the basis of the bill as originally brought and amended, with all the original parties, and the writ of error was sued out on the same basis, this court will consider the case so made, although an order appears in the record, dated some four years previous to the judgment complained of, dismissing the bill as to two of the defendants, their names not having been actually stricken, nor the attention of the presiding judge otherwise called to the fact that they were not parties.

Equity. Judgment. Practice in the Superior Court.  
Practice in the Supreme Court. Before Judge CRAWFORD.  
Taylor Superior Court. April Term, 1879.

Reported in the decision.

O. M. COLBERT; W. A. LITTLE, for plaintiffs in error.

W. S. WALLACE; WILLIS & WILLIS, for defendant.

JACKSON, Justice.

Jackson Perkins exhibited his bill against William H. Walker, Augusta A. Walker and S. Scandrett, administrator of Robert Scandrett, alleging that on the 17th day of December, 1870, he purchased from Walker & Walker three hundred and fifty acres of land in Taylor county, and gave his four notes, one for \$350.00, due January 1st, 1871; one for \$350.00, due January 10th, 1871; one for \$749.00, due December 25th, 1871, the other for \$798.00, due December

25th, 1872, and for which the Walkers gave him bond to make title on the payment of the money. That when he purchased, the Walkers represented that they had a good title, free from liens, and he bought on such representations; that the representations were false; that there are a number of judgments outstanding against the Walkers; that on January 1st, 1873, Walker sold to Scandrett the note for \$798.00, and that Scandrett brought suit on it to the April term, 1873, Taylor superior court; that on the 5th day of August, 1873, the United States marshal sold said land under an execution from the United States fifth circuit court, in favor of McLean & Statesberry *vs.* W. H. Walker, for \$300.00, to one Silas Monk; that to keep himself from being dispossessed he bought the land from Monk the same day that he went into possession under the sale from Walker, and was so in when the sale was made; that when Scandrett purchased the note he had notice of all the facts; that after the suit was commenced Scandrett died, and his representatives were made parties, and that at April term, 1874, judgment went against him by default for the amount of the note. The Walkers are insolvent, and were so when he purchased the land. That he has paid all the purchase money except this judgment; that the land has greatly depreciated, and at the time of the purchase by Monk was worth only what he paid. Waives discovery, and prays for perpetual injunction against the *fi. fa.*

Complainant amended his bill and alleged that at the time of the sale under the execution he owned the execution, paid \$800.00 for it, was obliged to buy it to quiet his title; that he paid \$50.00 to have the land sold, and that these amounts ought to be allowed to him as a set-off against the judgment.

He further alleges that he pleaded these facts in defense of the suit at April term, 1874. That James Johnson, judge presiding, ruled that they could not be pleaded at law, but could be prosecuted by a separate bill; that he

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*Waters et al., executors, vs. Perkins.*

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then withdrew his pleas, and judgment went against him by default.

Defendants demurred generally to the bill as amended. The court overruled the demurrer, and defendants excepted. Scandrett, administrator, died, and his executors were made parties.

The ground on which the demurrer rests is, that the complainant had a complete remedy when he was sued at common law, and did not avail himself of it, and is concluded by the failure so to avail himself of that defense, of which he had full knowledge. The fact is that he did file a plea, but the presiding judge—Judge James Johnson—being of the opinion that he must go into equity, the plea was withdrawn, and judgment went by default against the complainant.

1. There can be no doubt that if a defendant has a good legal defense to a suit at law, he must then make it, or he will be concluded, Code, §3129; and equity will not relieve him, unless he failed to make the defense by the fraud of the other party or accident, and without fault in himself. Code, §3129.

But the defense in this case was equitable. Was he bound to plead this equitable defense at law? Certainly not, if it was necessary to bring in other parties; because a court of law cannot make new parties to a cause. Code, §3480. *Radcliffe & Lamb vs. Varner & Ellington*, 56 Ga., 222. Here the Walkers were made parties; they seem to be necessary parties; they held the title to the land sold to Perkins; they made the false representations; and to quiet the possession of Perkins, it would seem that they should be made parties and be heard in the case, and a decree be rendered against them too. Accordingly they were made parties.

2. But it is said by the defendants' counsel that the record shows that the bill was dismissed as to them in 1875, and such an order does appear of record. But the attention of the court below was not called thereto at all,

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*Waters et al., executors, vs. Perkins.*

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and the usual rule in considering a demurrer is to look only at the bill and exhibits. If the Walkers' names had been stricken from the bill, pursuant to the order, then the fact that they were not parties would have been apparent from the bill itself, and could have been considered by the court.

But the judgment overruling the demurrer is in these words :

<p>“ Jackson Perkins  <i>vs.</i>          H. C. Holbrook, executor of Robert Scandrett, F.          W. H. Walker and Augusta Walker.</p>	}	<p>Bill for injunction.</p>
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“ After argument had, it is ordered by the court that the demurrer to said bill as amended be, and the same is hereby, overruled, and that said case stand continued. April Term, 1879.”

So that all were then treated as parties. And in the bill of exceptions they are still treated as parties, and the case, as on trial on the demurrer, is alleged to be “ a case pending on the equity side of the said court, to-wit : Jackson Perkins, complainant, *vs.* Elam B. Waters, Henry Holbrook, executors of Robert Scandrett, and Wm. H. and Augusta Walker.” Therefore, it is clear that the judgment complained of here in this writ of error is a judgment on this bill, wherein the Walkers as well as Scandrett's executors are parties; and in that bill there is equity; and the overruling the demurrer to that bill is not error.

It is unnecessary to consider the question whether there are other good reasons in this record why this bill should carry the case to the jury. It would seem settled that generally the defense, even if equitable, must be made to the suit while in progress, 52 *Ga.*, 469; 55 *Ga.*, 630; but, independently of the necessity of new parties, other circumstances might authorize equity to interpose even after judgment, and the failure to make a defense before judgment with full knowledge of its existence, if that defense be purely equitable. But “ sufficient unto the day is the evil thereof.”

Judgment affirmed.

## HALL vs. THE STATE OF GEORGIA.

1. When a preliminary examination is had as to the force, threats of violence, etc., used to procure a confession from the defendant, the better practice is, and impartial justice demands it, that the jury should retire whilst the admissibility of the evidence is considered by the court.
2. When, therefore, one witness testified in the presence of the jury, on such examination, that he heard the defendant confess to others, and another witness that he made a confession to him, a new trial will be ordered, even though the confession itself was excluded.
3. It was error in the court to charge upon the hypothesis of the pistol of the deceased having been found in the possession of the defendant on the day after the homicide, when the evidence disclosed that the weapon was discovered in a house occupied by defendant jointly with others, without alluding to the joint occupancy, and their equal facilities to have concealed it.

Criminal law. Practice in the Superior Court. Confessions. Charge of Court. New trial. Before Judge SIMMONS. Crawford Superior Court. March Term, 1879.

Reported in the opinion.

STROUD, SMITH & WINSLOW ; HALL & SON ; BACON & RUTHERFORD, for plaintiff in error.

C. L. BARTLETT, solicitor general ; W. S. WALLACE ; L. D. MOORE, for the state.

CRAWFORD, Justice.

The defendant in error was jointly indicted with Green Thurman, Sr., Isham Thurman, and Green Thurman, Jr., for the murder of Augustus H. Murchison. He was tried separately, and a verdict of guilty rendered against him. A motion for a new trial was filed, upon several grounds, and, after argument had, the same was refused by the court, and the plaintiff in error excepted.

The state relied upon circumstantial evidence and con-

fessions for a conviction, and whilst this court will not say that the evidence offered was or was not sufficient to justify a verdict of guilty, yet we are of opinion that there were errors committed in the admission of some of the evidence touching the confessions said to have been made, as also in reference to one of the charges given by the court, under one or both of which the jury may have been induced to render their verdict.

1. 2. The sheriff of the county was introduced by the state to prove certain confessions of the prisoner, and he was asked: "Did you have him under arrest for this killing?" Ans. "Yes." "Did he make any statement to you about it?" "Not directly to me, he has not. I heard him make it to somebody else." "Did you hold out to him any reward, or did you threaten him in any way?" "I did not, sir." "Where was it?" "In the court-house here." "What did he say to you?" This question was objected to by prisoner's counsel to inquire "whether others had not used threats to prisoner to get this statement?" "I think they had, sir." "Is it true that Mr. Stroud had just fired a pistol off close to Joe and threatened to kill him if he did not tell all about it?" "I heard a pistol fire, and Mr. Stroud told me." "Was not the statement you speak of made immediately after the pistol was fired?" "Yes." "Did not Stroud come in with a pistol in his hand just behind Joe, and was it not just then that Joe made the statement to you?" "Yes, sir."

Mr. Stroud testified as follows: "Was employed as counsel by Green Thurman, but not for Joe Hall, at the time the alleged statement was made. Immediately after I made these threats to Joe, I told him I would protect him as an attorney. After he made some confessions, I would protect him. I threatened to kill him if he did not tell what he knew about the killing of Murchison. Mr. Bond, the sheriff, had Green Thurman, Joe Hall and these two boys, Isham and Green Thurman, Jr., under arrest in the ordinary's office. I got permission to take them to my

office in the basement. I think Mr. Dannielly was with me. I took Joe along, and asked him to tell me all about the circumstances of Murchison's death that he knew. It was the first night after Murchison's death, and Joe said he knew nothing about it. I pressed him to make a statement, and he declined to make any. I finally pulled out my pistol—I think I had it out all the time while with them, as I was assisting Bond in guarding them—and I pointed the pistol near his head and fired it off right at (by) his head. I told him I was going to kill him if he did not tell me all about the circumstances of the killing of Murchison. I cocked my pistol again, and said I missed you that time, but the next time I'll get you. He said hold on, he would tell all of it, and did so. Bond came in immediately afterwards, and that is the statement that he refers to."

"I kept the pistol out, and if he would slack up I would threaten him again and spur him up. He was in a tremble, seemed much excited, and begged me not to kill him."

It is to be remembered that the scene described transpired on the first night after the homicide, in the courthouse, the most public place in the county, and although it does not appear that any of the jurors knew what that confession was, yet they had heard the testimony of Bond and Stroud upon the stand, and whatsoever the confession was, was probably as well known to the jurors as to the witnesses. Even if this were not so, *at that time, on the trial, in their presence*, the sheriff swore that the prisoner made a statement, not directly to him, but he heard him make it so others, a statement about the Murchison murder. Stroud, *at the same time, on the pending trial, and in their presence*, testified that he made confessions to him of all the circumstances of the Murchison murder. It is true that the presiding judge refused to allow the confessions which these witnesses *swore* that the prisoner had made, to be repeated to the jury, yet every member of it knew

that a confession in this connection meant the acknowledgment of the crime, an open declaration of his guilt.

It is the unanimous judgment of this bench, that when such preliminary examinations as this are to be had, that the better practice is, and impartial justice demands it, that the jury should be retired from the box whilst the admissibility of the evidence is considered by the court. When he has ruled upon it, let the jurors be brought in, and the cause proceed with such further rights as the law gives to the prisoner upon his confessions. His honor, Judge Simmons, did that which is usual and customary; he properly refused to allow the testimony, held it illegal and inadmissible, but how vain a thing it was for those jurors to seek to efface from their memories the pregnant words of these two witnesses, who *swore* that he *had made* confessions, though the *words* thereof were withheld from them. And if at any time the verdict "in even balance hung," back came, unbidden, the words, he has confessed it all, and cast the beam against the prisoner upon that which the judge had vainly endeavored to exclude.

To let this verdict stand, therefore, would be not only a violation of the rights of the accused, but would be permitting the conduct of the parties having him in charge to pass unrebuked, whilst we regret to say that it meets with our most unqualified condemnation.

3. We think that the court erred in charging the jury as follows: "If you believe that Murchison had a pistol on the day of his death, and that the next day the pistol was found in the possession of the defendant, you may take that into consideration in determining whether or not he was connected with the crime. If the evidence satisfies you that it was Murchison's pistol, that he had it the day of his death, and that it was found the next day in the possession of defendant, or in a place where he had concealed it, then it was incumbent on him to explain how he got it, if he has not explained."

Our objection is not to the soundness of the principles



embodied in the charge, but that there is not in this record sufficient evidence to have authorized its being given. No witness testified that it was found either in defendant's possession or in a place where he had concealed it. James N. Harris testifies that "they found a couple of pistols that were in a house near that which was occupied by Green Thurman, Sr., where the boys slept—I suppose the boys slept there, there were bed-clothes there—we found one pistol in a box, every barrel was loaded; one had been recently discharged, and seemed to be charged with a bright ball like pewter; the others did not appear to have been discharged recently. The other pistol was found at the southeast corner of the house, under some cotton seed, near the wall." None of the witnesses say positively that any one slept in that house, though they say it looked as if it were so occupied, still there was no bed in it, and it was shown that Green Thurman, Jr., and Isham Thurman, the sons of Green Thurman, Sr., were occupants as much so as was the accused. There is no testimony of any other witness fixing the possession of Murchison's pistol upon Joe Hall, or that he had it where it was found, stronger than that of Harris. Its possession, or concealment, therefore, was proven to have been quite as strongly put upon the other two co-defendants as it was upon Hall. And the naked charge of the judge, referring alone to the defendant, and of his having it in possession, or concealing it, without alluding to the joint occupancy of the house by the others, and their equal facilities to have concealed it, was such error as worked harm to the defendant. Besides, the only allusion in the evidence as to how the pistol got on the premises was that Green Thurman, Sr. carried it there, and if that is true, its location and concealment might quite as likely have been the work of one of his sons as to have been that of Hall.

It is not out of place to say, that whenever there is a reversal of the judgment in such a case as this, that very

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Ross, administrator, *et al.* vs. Byrd, guardian.

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many of the people of the vicinage construe it to mean that, in the opinion of this court, the party is not guilty. With his guilt or his innocence this judgment has nothing to do—they are to be passed upon under the law and the testimony as the same shall be presented and adjudged upon the new trial which we herewith award.

Judgment reversed.

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ROSS, administrator, *et al.* vs. BYRD, guardian.

Where a son, by his guardian, filed a bill praying to have the will of his deceased father construed so far as his rights were concerned, that the administrator be instructed as to the management of the estate, and be required to pay over to complainant, until the final hearing, out of the income, what was necessary for the temporary support and education of the son, an order requiring the payment of a certain amount for those purposes was not a final judgment which could be reviewed on writ of error; and a bill of exceptions predicated thereon will be dismissed.

Practice in the Supreme Court. February Term, 1880.

Reported in the decision.

DABNEY & FOCHE; J. BRANHAM, for plaintiffs in error.

WRIGHT & FEATHERSTON, for defendant.

WARNER, Chief Justice.

It appears from the record before us in this case, that on the 22d of August, 1879, the complainant, Charles N. Thompson, by his guardian, J. P. M. Byrd, filed his bill against A. E. Ross, administrator *de bonis non*, with the will annexed, of William R. Thompson, deceased, *et al.*, in which he prayed that the will of his deceased father might be construed and interpreted as to his rights under

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Ross, administrator, *et al. vs.* Byrd, guardian.

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it, as well as the rights and interests of other parties claiming under said will, and that the said administrator be directed and instructed as to his duties in the execution thereof by the judgment and decree of the court, and that until the final hearing of the cause said administrator might be required by an order of the chancellor to pay over to complainant out of the income of said estate what is necessary for his temporary support and education, as specified in the testator's will. The chancellor required the parties to appear before him, and after hearing the evidence offered, passed an order that the administrator pay to the guardian of complainant the sum of \$214.00 out of the income of the estate for the present year for his support and expenses at the school he is now attending at Dahlonga, and authorized the guardian to keep him there until the end of the present session of the school (to-wit) the 1st of February next, and not longer without further directions from the court. To this order the defendants excepted and brought the case to this court.

When the case was called here the defendant in error made a motion to dismiss it on the ground that it was prematurely brought. This was merely an interlocutory order of the chancellor in the cause; the main cause is still pending in the court below. The defendants should have entered their exception to the decision of the chancellor on the record, as provided by the 4250th section of the Code, and upon the final disposition of the cause in the court below, they could then have brought it here; but so long as the main cause was pending in the court below, the interlocutory order passed in the cause was prematurely brought here and must be dismissed. Code, §4250.

Writ of error dismissed.

WHITAKER *vs.* HUDSON.

Though a blacksmith shop may not be a nuisance *per se*, yet the discretion of the chancellor enjoining its erection will not be controlled where the affidavits submitted as to whether the shop, under the circumstances of this particular case, would constitute a nuisance, preponderated, in his opinion, in favor of complainant.

Injunction. Nuisance. Before Judge BUCHANAN.  
Heard County. At Chambers. March 2nd, 1880.

Reported in the opinion.

C. W. MABRY; P. H. WHITAKER, JR., for plaintiff in error.

GEORGE A. CARTER, for defendant.

CRAWFORD, Justice.

The complainant in the court below filed his bill alleging that the defendant had commenced the erection of a blacksmith shop within seventy-five feet of his dwelling house, without a necessity therefor, as he now has and owns another in the same village; that it is done to annoy and worry him and his family, and to force upon him the purchase of the land upon which it is to be erected at double the real value thereof; and that the shoeing of horses, shrinking of tires, the unhealthy and disagreeable smoke issuing therefrom, the noise from the blowing of bellows, two of which are to be used, the hammering on the anvils, the obstruction of his view to the street, and the danger from fire, all conspire to make the same a nuisance by reason of its location, and the effect in diminishing the value of his residence, the injury to himself and family in their comfort and happiness, as well as the inevitable loss of his wife's health. Wherefore he prayed an injunction against the erection of the said blacksmith shop.

The defendant answered the bill denying the purpose and intent attributed to him, and alleging that the lot is

worth the money asked for it ; that the same was its reasonable market value ; that it would not endanger the complainant's house from sparks or fire, as he intended to have forges of stone or brick, with proper arches, flues and bonnets on the tops ; that he only intended to work for the public, and not to annoy or affect the health or comfort of complainant's wife or family ; that the shop does not obstruct the view from complainant's house ; that he does own another shop, but it is beyond the railroad depot, and inconvenient for his customers, and, therefore, as he was only seeking to use and enjoy his property in a lawful way, he prays to be dismissed with his reasonable costs.

The parties to this bill supported their respective sides with numerous and conflicting affidavits, the chancellor heard and considered them, and after argument had thereon, granted an injunction restraining the defendant from the erection of the said shop until the final hearing on the merits ; whereupon the defendant excepted and resorted to his writ of error.

Whilst we are prepared to hold that a blacksmith shop is not a nuisance *per se*, yet as there may be circumstances in which it could be shown that it was, we are not prepared to hold, on the other hand, that in no case can it be shown by proof that it was in fact a nuisance. The granting of this injunction by the chancellor shows that the evidence, in his opinion, preponderated in favor of the complainant, and that he would allow a jury to pass thereon, and therefore we will not interfere with his judgment. And we will add, that if he had refused it we should not have reversed it, but would have allowed the case to have gone before the jury under the law, and let it be ascertained upon the trial whether, in the enjoyment and exercise of a clear legal right, which is not declared by the law or the courts to be a nuisance *per se*, it is possible that it may be so used as to become a legal injury and an infringement on the legal rights of others, and therefore a nuisance. Hence we affirm the judgment.

SAULSBURY, RESPRESS & COMPANY *vs.* BLANDYS.

1. A question which has been settled by a verdict cannot be again raised by affidavit of illegality to the *fi. fa.* founded thereon.
2. Even if it be allowable by affidavit of illegality to go behind the judgment and inspect the verdict, still the reasonable interpretation of a verdict in favor of plaintiffs for a stipulated amount would be that such finding was against the defendants who had been made parties to the case, and no others; and a decree against such defendants only would follow the verdict.
3. Factors to whom the drawer of a draft for the purchase money of a steam engine for ginning cotton was in debt, and who agreed to accept it in order to facilitate their collection from the drawer out of his cotton, did not stand on the footing of accommodation acceptors, but were original contractors.

Illegality. Judgments. Practice in the Superior Court. Contracts. Before Judge SIMMONS. Bibb Superior Court. April Term, 1879.

An execution was issued against Saulsbury, Respess & Co. and John C. Curd, security on *supersedeas* bond, in favor of H. & T. Blandy, for eleven hundred and seventy dollars, principal, and interest, and was levied on forty-five bales of cotton, the property of Saulsbury, Respess & Co. They filed an affidavit of illegality upon the following grounds:

1. Because the decree entered up in the case upon which said execution purports to issue does not follow the verdict rendered therein; because the verdict was a general verdict against Frederick D. Wimberly, principal, and Saulsbury, Respess & Co., securities, and the decree upon such verdict was entered up against the securities alone, without showing their relation to the said Wimberly, and no decree has been entered up against Wimberly; which failure to enter up such decree discharges the sureties.
2. Substantially the same as first ground.
3. Because Saulsbury, Respess & Co. being sureties, and being joined in same suit with their principal, were

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Saulsbury, Respass & Co. vs Blandys.

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entitled to have a decree against Wimberly, from the date of verdict, for their indemnity.

4. Because the failure of the Blandys to enter up judgment against the principal increased the risk of the sureties, and discharged them.

5. Because the Blandys took a mortgage upon fifteen head of stock to secure the draft, and failed to record it, which increased risk of sureties, and discharged them.

On demurrer, the court dismissed the affidavit of illegality, and defendants excepted.

HALL & SON; E. F. BEST, for plaintiffs in error.

LANIER & ANDERSON; N. E. HARRIS, for defendants.

JACKSON, Justice.

This is an affidavit of illegality to a decree in equity rendered in favor of the defendants in error against the plaintiffs in error on various grounds alleged therein. This decree was rendered on a verdict of the jury which settled the rights of these parties after a stubborn litigation. The bill was filed to compel the plaintiffs in error, Saulsbury, Respass & Co., to accept and pay a draft drawn by Wimberly on them, and which it was charged they had agreed to accept and pay to the Blandys, who are the defendants in error, the draft being for a steam engine for ginning cotton and other purposes. The case has been here twice before, first in 53 *Ga.*, 665, where the law was settled on demurrer, and the bill afterwards amended to accord with the judgment then pronounced. On the bill so amended, the facts were tried, the law properly ruled, a verdict had, a new trial refused, and that judgment affirmed on the merits by this court, reported in 60 *Ga.*, 646. Now it is here again on an affidavit of illegality to the execution issued on that decree.

1. There are five grounds taken in this affidavit, the fifth and last of which was one of the issues made on the

trial of the bill, and decided then adversely to Saulsbury, Respass & Co., and of course that will not be again considered. It is *res adjudicata*. The other four rest on the allegations that the decree does not follow the verdict, and that Saulsbury, Respass & Co. are accommodation acceptors, and therefore sureties, and that the failure to take a decree against them in that character, and against Wimberly, for whom they accepted, operated to discharge them.

2. Passing by the question whether there is any remedy by affidavit of illegality, where the affidavit has to go behind the judgment and inspect the verdict—Code, §3671—it is enough to say that this decree does follow this verdict, construed, as it must be, in the light of the pleadings. The verdict is that “the jury find for the plaintiffs in the sum of eleven hundred and seventy dollars and twenty-one cents, and interest from maturity of draft, April 1st, 1872, with all costs.”

The decree is:

“Whereupon it is ordered and decreed by the court, that the verdict of the jury aforesaid be made the decree of this court, and that the plaintiffs, H. & F. Blandy, do recover of the said defendants, Saulsbury, Respass & Co., the sum of eleven hundred and seventy dollars and twenty-one cents (\$1170.21) for principal debt, and four hundred and fifty-six dollars and forty-three cents as interest to the date of this decree, and the costs of court to be taxed by the clerk, and that execution do issue for said sum against said defendants. This October 29th, 1877.”

There was no prayer for relief against any other person than Saulsbury, Respass & Co. A subpœna was prayed for against Wimberly, but he was not served, and never made any plea or answer. The only issue made and tried was between the Blandys and Saulsbury, Respass & Co.; the jury found against Saulsbury, Respass & Co. on that issue; the verdict must always be reasonably construed, and the pleadings may be referred to in order to ascertain its meaning, if doubtful; and that verdict is for



the complainants, and does not name the defendants; it therefore reasonably means those who made the issue with the complainants, who defended the case on demurrer, on the trial, and on two bills of exception to this court; and those defendants are Saulsbury, Respass & Co. The decree follows the true intent and meaning of this verdict, and is properly made.

3. Nor can it be truly said that Saulsbury, Respass & Co. are merely accommodation acceptors, much less sureties in the true sense of that word. They were the factors of Wimberly, received his cotton crop, he was indebted to them, and, according to complainants' side of the case, which the jury believed, they said that they must accept for him for their own advantage, to help him in ginning that crop with the machine furnished by complainants, and thus to facilitate their collection of part of the indebtedness, and get control of the crop for the future. As between themselves and Wimberly, the latter may owe them the amount of this judgment, when it is paid by them; but as between complainants and these factors who agreed to accept, they are original contractors. If they desired a decree against Wimberly, they should have pleaded and prayed so as to get it. It was no part of the business of complainants to do so. Besides, Wimberly is insolvent, he was not served, did not plead, no prayer was made against him, and probably these are the reasons he was wholly disregarded in the suit, the verdict and the decree.

The only question for consideration by us is whether we should not award damages in the case.

We rather think that the case is brought for delay; but as that object may not have been the only motive which induced these complainants thus stubbornly to litigate, and as they gained the first case, brought here on demurrer, we forbear to yield to the demand for damages made this time, in the hope that the country will not again be troubled with the case.

Judgment affirmed.

MOSELEY *et al.* vs. JENKINS, guardian.

On January 1st, 1859, A. W. Moseley, as principal, and J. A. Moseley, as security, made their note, payable one day after date, to Jenkins, for \$650.00. Jenkins died. In 1867 his administrator brought suit thereon in the county court. In 1868 county courts were abolished. The papers were lost and the case was never transferred to the superior court, nor was any effort made to establish copies of the papers. In 1869, on a bill filed for direction by the administrator, the note was transferred by decree to Reid, guardian, and in the same year the administrator was discharged. In 1875 the guardian made a compromise with the makers of the note, by which they paid part of the money in cash, and made a parol promise to pay the balance agreed upon. Refusing to do so, the successor of Reid brought suit:

*Held*, that the suit being virtually abandoned in 1868, the statute of limitations began to run, and more than six years having elapsed before the compromise, a parol promise was not sufficient to revive the claim.

Statute of limitations. Contracts. Before Judge SPEER. Putnam Superior Court. September Adjourned Term, 1879.

Reported in the decision.

W. B. WINGFIELD; W. F. JENKINS, for plaintiffs in error.

H. A. JENKINS; J. W. PRESTON; CALVIN GEORGE; JACKSON & LUMPKIN, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants to recover the sum of \$550.00 which he claims to be due under an alleged compromise as set forth in his declaration. The defendants pleaded want of consideration, and the statute of limitations. On the trial of the case, the jury found a verdict in favor of the plaintiff. A

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*Moseley et al. vs. Jenkins, guardian.*

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motion was made for a new trial on various grounds, which was overruled, and the defendants excepted.

It appears from the evidence in the record, that the defendants, A. W. Moseley as principal, and J. A. Moseley as security, executed their promissory note to F. S. Jenkins for \$650.00, dated 1st of January, 1859, and due one day after date, that suit was brought on said note by Young, as administrator of F. S. Jenkins, deceased, in the county court of Putnam county, in the year 1867, or 1868—that in 1868 the county court was abolished and the record of this case in the county court was never transferred to the superior court, but was lost, and no effort was made to establish it—and nothing was done to prosecute the suit. A bill was filed by Young, the administrator of Jenkins, for direction, etc., and a decree was had, in 1869, by which this note on the Moseleys, with others, was directed to be turned over to Reid as guardian, with authority to compromise and settle the same—to this bill the Moseleys were not parties. Young was discharged as administrator in 1869. In March, 1875, the alleged compromise of the \$650.00 note was made with Reid. The defendants paid \$450.00 of the compromise money soon afterwards, but refusing to pay the balance due on the note by the compromise the present suit was brought, founded thereon, instead of on the note—and the controlling question in the case is, whether the plaintiff's right to recover the amount due on the note was not barred by the statute before the compromise in March, 1875, was made? The statute of limitations commenced to run in favor of the defendants on the note on the 2d of January, 1859, and continued to run until 1860, when it was suspended until the 21st of July, 1868. By the constitution of 1868 county courts were abolished, and the books, papers and proceedings, and the unfinished business thereof, were directed to be transferred to the superior court. Whether the suit upon this note in the county court was *intended* to have been abandoned or not,

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Barnett *et al.* vs. The People's Bank of Newnan.

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it was for all practical purposes abandoned. There was no effort or attempt to establish the papers in that suit (alleged to have been lost) in the superior court, from the 21st of July, 1868, up to the time of the alleged compromise in March, 1875, more than six years, and that being so, the plaintiff's right of action upon the note was barred both by the reason and spirit of the statute, if not by the letter thereof, before the compromise was made in March, 1875. The compromise was in relation to the money due on the note after the right of action was barred thereon by the laches of the holder thereof, and the *parol* promise made by the defendants at the time of the alleged compromise, did not take it out of the operation of the statute. Code, §2934. In view of the evidence contained in the record and the law applicable thereto, the court erred in overruling the defendants' motion for a new trial.

Let the judgment of the court below be reversed.

BARNETT *et al.* vs. THE PEOPLE'S BANK OF NEWNAN.

1. A demurrer to a bill in equity, whether general or special, should be filed and disposed of at the first term. But when the complainant seeks, by amendment, to strengthen his cause, a demurrer to the new case, as thus presented, may then be filed.
2. Since the act of December 12th, 1871, "To provide for sales of property in this state to secure loans and other debts," a court of equity cannot reform an absolute deed, executed under such act, into a mortgage for the purpose of protecting the wife's homestead, upon the allegation that such instrument was intended as a mortgage, was so understood by herself and husband, and that upon this understanding she gave her consent to its execution.

Equity. Demurrer. Homestead. Deeds. Before Judge BUCHANAN. Heard Superior Court. September Term, 1879.

Reported in the opinion.

ment of the court should be had thereon when made either as to the forum, the parties, their rights and causes of action, or else the respondent could secure unreasonable delay. But the respondent cannot demur to that which doth not exist; so that when the complainant seeks by amendment to strengthen and support his cause, then if it is matter which is subject to demurrer on any of the recognized grounds thereof, it is open to the same, and, indeed, is subject to all the modes of defense applicable thereto.

2. Should this bill have been tried on its merits? The answer to this question must depend upon the rights of the parties as therein set forth.

The original bill claimed that the deeds made were only intended as mortgages; that the complainant, Eliza J. Barnett, and her husband, so understood them, and that with that understanding she gave her consent to their execution; that the deed of 1874 was but a renewal of that made in 1873, and therefore she prayed that it be reformed and corrected so as to make it a mortgage, and thereby give protection to her homestead and exemption. Since the act of December 12th, 1871, "To provide for sales of property in this state to secure loans and other debts," no such decree as sought by this bill could be granted.

The amendment shows that the bank has no title whatsoever to any of the lands contained in the complainant's homestead, and with that admission it becomes immaterial to her as to the manner in which the deed from her husband was procured, whether it was a mortgage or a deed, or whether obtained with or without her consent, and she having no standing in court, must be dismissed therefrom.

Judgment affirmed.

The Atlanta and West Point Railroad Co. vs. Venable, next friend.

THE ATLANTA AND WEST POINT RAILROAD COMPANY  
vs. VENABLE, next friend.

Section 2971 of the Code provides as follows: "A widow, or if no widow a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children."

*Held*, that this section gives a right of action against a railroad by the minor children for the homicide of the mother, and does not restrict their right to the homicide of the father.

Railroads. Damages. Parent and child. Laws. Before Judge HILLYER. Fulton Superior Court. September Term, 1879.

Venable, as next friend of certain minor orphan children, brought case against the Atlanta and West Point Railroad for the homicide of their mother. Defendant moved to dismiss the case because the children had no right of action. The motion was overruled and defendant excepted.

N. J. HAMMOND, by COLLIER & COLLIER, for plaintiff in error.

T. P. WESTMORELAND, for defendant.

JACKSON, Justice.

This was a demurrer to plaintiff's declaration against the company, or a motion to dismiss it, on the ground that the minor children of a mother killed by the negligence of railroad officials, had no right of action against the railroad company, under the laws of this state. The question turns on the construction of section 2971 of our Code, which is in these words: "A widow, or if no widow

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The Atlanta and West Point Railroad Co. *vs.* Venable, next friend.

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a child or children, may recover for the homicide of the husband or parent ; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children." The court below held that the word parent meant either father or mother in its ordinary sense, and that this signification was not restricted by the other words in the section. We think that the ruling is right. If the legislature had meant to limit the recovery to the death of the father, the word father would have been employed. The fact that the word "parent" is used seems to us pregnant with meaning. In all statutory enactments in this state, "the *ordinary* signification shall be applied to all words, except words of art, or connected with a particular trade or subject-matter," is the language of section 4 of the Code. The word "parent" is connected with no trade and is not a word of art ; it means ordinarily mother as well as father, and must be so construed.

The reason and spirit of the enactment would require the same construction. In case of the death of the father, the mother is bound to support the children—Code, §764—therefore they have an interest in her life, and ought to be authorized to sue for her homicide, just as well as they would be for their father's if he had been killed and they were deprived of his support. The section of the Code under consideration—§2971—is codified from the acts of 1850 and 1855—6—Cobb's Digest, p. 476 ; acts of 1855—6, p. 155 ; and a careful examination of those acts does not lead us to a different construction of this section. Even if the words of those acts were so changed as to give a larger meaning to the Code, that meaning would be applied as the latest utterance of the law-making power.

Judgment affirmed.

COX, relator, vs. HILLYER, judge.

1. The general rule is that when the refusal of a new trial in a criminal case has been affirmed by this court, no second bill of exceptions can be allowed. The only exception to this general rule is such "an extraordinary motion or case" as is specified in §3721 of the Code.
2. The extraordinary motions or cases contemplated by the statute are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder, and it afterwards appears that the supposed deceased is still alive, or where one is convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character. Whilst the newly discovered testimony now brought to the attention of this court, discloses some facts not in evidence before, yet, in its general character and bearing, it is merely cumulative to the case heretofore presented, and would scarcely have produced a different result on the ordinary motion for new trial, much less can it give to this proceeding the peculiar characteristic of being "an extraordinary motion."

Practice in the Superior Court. Practice in the Supreme Court. *Mandamus*. New trial. Before the Supreme Court. February Term, 1880.

Cox was tried for murder and convicted at the March term, 1879, of Fulton superior court. He moved for a new trial on various grounds, among others because the court refused to continue on account of the physical condition of defendant and popular excitement. The motion was overruled; defendant excepted, and the supreme court affirmed the judgment at the September term, 1879. When Fulton superior court met again in March, 1880, the defendant made another motion for new trial, which he alleged to be extraordinary. The grounds of this motion were, in brief, as follows:

(1.) Because of physical inability on the part of defendant to properly manage his case, and because of newly discovered evidence to prove the same.



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Cox, relator, vs. Hillyer, judge.

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(2.) Because of newly discovered evidence of J. W. Murphy, a witness sworn on the trial of the case, that he had promised defendant on the day before the homicide to assist him and use his influence in making the trade between Alston, the deceased, and Walters, for the sale of General Gordon's interest in penitentiary company No. 2. The sale of this interest was under discussion at the time of the homicide of Alston by Cox. Defendant explained his failure to remember this at the trial and first motion for new trial on the ground of his physical condition.

(3.) Because of newly discovered evidence of Joseph Bennett, that he met Alston about half an hour before the homicide going towards the place where it occurred, and that Alston stated that he was going over to see Cox, and one of them would be dead before night.

The grounds were supported by various affidavits. The last two contain facts not proved at the trial, but which go to strengthen the evidence then introduced.

The court refused a rule *nisi* on this motion. Defendant's counsel tendered a bill of exceptions to the court, which he refused to sign, and they thereupon made this application for a *mandamus*.

D. P. HILL & SON; GARTRELL & WRIGHT; D. F. & W. R. HAMMOND; CANDLER & THOMSON; R. S. JEFFERIES; J. A. BILLUPS; W. R. HODGSON; L. J. GLENN & SON, for plaintiff in error.

B. H. HILL, Jr., solicitor-general; HOPKINS & GLENN; PAT CALHOUN; H. D. D. TWIGGS; HULSEY & McAFEE; SAM HALL, *contra*.

WARNER, Chief Justice.

This is an application to this court for a *mandamus* to require the judge of the superior court to sign and certify a second bill of exceptions for a new trial in the case of *The State vs. Edward Cox*, who was tried and found guilty

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Cox, relator, vs. Hillyer, judge.

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of the offense of murder in Fulton superior court. It appears from the record that at the term of the court at which the defendant was tried, he made a motion for a new trial on the several grounds therein set forth, which was overruled, and the defendant excepted and brought the case to this court, which affirmed the judgment of the court below.

After the *remittitur* from this court had been filed in the clerk's office of the court below, but before it had been made the judgment of that court by its order, the defendant made a second motion for a new trial upon the ground that it was "an extraordinary motion or case," as provided for by the 3719th and 3721st sections of the Code. Upon the hearing of the second motion for a new trial, the court overruled it, and the presiding judge refused to sign and certify a second bill of exceptions for a new trial in that case, for the reasons (amongst others stated by him in his judgment of refusal) that the matters presented in the motion did not make such an extraordinary case, within the meaning of the law, as would authorize a second motion for a new trial after the first motion had been made and decided, and this ruling of the court is the error complained of here.

The general ruling undoubtedly is, that when a motion for a new trial in a criminal case has been overruled in the court below and brought to this court on a bill of exceptions, and the judgment of the court below is affirmed, no second bill of exceptions in that case can be allowed or granted. The only exception to that general rule is that specified in the 3721st section of the Code, when it is "an extraordinary motion or case," and the question here is whether, taking everything to be true as stated in the defendant's motion, and in the affidavits in support thereof, it makes such "an extraordinary motion or case" as will take it out of the general rule hereinbefore stated? After the most anxious and careful examination, we are satisfied that it does not. The extraordinary motions or cases

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Cox, relator, vs. Hillyer, judge.

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contemplated by the statute are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder, and it afterwards turns out that the man he was charged with having killed is still alive, or where a man has been convicted on the testimony of a witness who is afterwards found guilty of perjury in giving that testimony, or from some providential cause, and cases of like character. The newly discovered evidence relating to the physical condition of the defendant at the time of his trial, as well as that relating to the main issues involved in the case on that trial, is merely cumulative in its character, and would hardly be sufficient of itself to have authorized the court to have set aside the verdict in an ordinary motion for a new trial—certainly not sufficient to authorize an extraordinary motion for a new trial to be made under the provisions of the Code before cited. It is true that Murphy and Bennett state two facts in their affidavits that were not proven on the former trial, but their evidence would only be *cumulative* evidence of that which was proven by other witnesses upon the main issues involved in the case. Their evidence might have strengthened the evidence for the defendant, but it would have been cumulative evidence nevertheless; it would have been cumulative evidence of that which had already been offered by the defendant upon the issues involved in the trial. *Malone vs. The State*, 49 Ga., 210; *Kelly vs. Hall*, 50 *Ib.*, 636. There is no precedent in the courts of this state of which we have any knowledge, that requires a judge to sign and certify a second bill of exceptions in a criminal case on the statement of facts contained in the record before us, and we shall be very slow to establish such a precedent. The judgments of the courts, when rendered by the properly constituted tribunals of the state, must be respected, obeyed and enforced.

Let the application for *mandamus* be discharged.

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Berrien, trustee, *et al.* vs. Thomas.

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BERRIEN, trustee, *et al.* vs. THOMAS.

1. A power of sale can be exercised only in the mode, and subject to the conditions prescribed by the instrument creating the power. If the sale be only authorized on the written consent of the *cestui que trust*, that consent must be obtained before the exercise of the power, and the court will not enjoin the dispossession of the purchaser from the trustee who bought without such consent, in order to decree a specific performance of the contract.
2. An injunction will not be granted to enable the court to decree payment to the purchaser for improvements placed upon the property by him, where there is no allegation of the insolvency of the trust estate and the improvements were on real estate, and where there was no prayer except for specific performance.

Injunction. Trusts. Powers. Before Judge SNEAD.  
Burke County. At Chambers. February 4th, 1880.

Reported in the decision.

T. M. BERRIEN; H. E. W. PALMER, for plaintiffs in error.

J. J. JONES; R. O. LOVETT, for defendant.

CRAWFORD, Justice.

Edmund I. Palmer, in consideration of love and affection for his daughter, Margaret M. Corker, conveyed to John T. Palmer certain lands in trust for the sole and separate use, benefit and behoof of the said Margaret for and during her natural life, and at her death to vest absolutely in such child or children as may be in life at her death by her intermarriage with Stephen A. Corker. This land, "should it become necessary at any time to sell, then in that case the said trustee, or any of his successors in office, shall have full power, by and with the written consent of the said Margaret, to sell and reinvest."

A part of this land so conveyed to the trustee, it is alleged, was sold to Robert Thomas, the defendant in

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Berrien, trustee, *et al.* vs. Thomas.

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error, by Stephen A. Corker, and which part so conveyed was subsequently reconveyed to the said Corker, and a verbal contract made by which Corker was to convey, by proper deeds, to said Thomas, a certain other lot in payment for the first lot conveyed, and for which, it is alleged also, that payment had been made. The said Thomas being in possession of this second lot without a deed, and threats being made by defendants to turn him out, he prays an injunction to restrain them from so doing, and a specific performance of his alleged contract with Corker. An injunction was granted by the chancellor, and the plaintiffs in error excepted.

The question made by the record is, whether, under the case made by the bill, the injunction was properly granted. This depends upon whether at the hearing, with the facts supported by the proof, the complainant is entitled to the relief prayed.

1. Here is a deed of trust conveying a life estate in lands to Mrs. Corker for her sole and separate use, with remainder over to her children, coupled with a power to sell, without the intervention of a court of chancery, should it become necessary at any time, by and with the written consent of the said Margaret. A trustee is always bound by the limitations declared in the trust, and in the case before us it is provided how and in what manner the sale may be made so as to divest the title of the *cestui que trusts*. But it is said that the consent of the life tenant was obtained to the sale of both lots. Admitting this to be true, it is not claimed that it was *that consent* required by the original grantor in the deed of trust. It is to be observed that the complainant is not a purchaser without notice of the trust, for in his deed to the first lot it is recited and made to appear that Corker was the trustee for his wife and children, and that Mrs. Corker's consent was necessary to a valid title, and yet he accepted the same executed by Corker in his individual name, and without the consent, in writing, of Mrs. Corker. It is

further insisted that the present lot, and about which this litigation arises, was given by Corker in exchange for the first lot by the consent of the tenant for life, and that in pursuance of the said sale and exchange that he is entitled to a specific performance of the contract because of the same, as also of the improvements made by him thereon.

The law is that "A power of sale, like all other powers, can be exercised only in the mode, and subject to the conditions, if any, prescribed by the instrument creating the power. And so, if the sale be directed to be made with the consent of the tenant for life, or of any other person, that consent must be obtained before the exercise of the power. And the court will not decree the specific performance of a contract by the trustees for the sale of the estate where the required consent had not been given at the time of the filing of the bill." Hill on Trustees, p. 478; Eng. Ch. Rep., 24, p. 46; 17 Ves., 454.

Perry on Trusts, §778, lays down the rule in these words: "When trustees have a power of sale at the written request and direction of another party, they cannot obtain a decree for a specific performance of a sale contracted by them without showing such writing, nor will proof of a part performance of the contract by the parties so as to take the sale out of the statute of frauds be sufficient." This same doctrine was held in 49 N. Y. Rep., 602, in a case brought to enforce a specific performance of a contract where the trust deed contained this clause: "Whenever they shall deem it proper to do so, by and with the advice, and consent of said Eliza, manifested by her uniting with them in the execution of any conveyance to sell absolutely or conditionally any part of the estate." The court held that "A condition attached to a power of sale contained in a trust deed, that the trustee should only sell by and with the consent of the grantor, to be manifested by his uniting in the conveyance, is valid. It is an essential condition, and cannot be dispensed with."

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Plant vs. Eichberg.

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2. The complainant insists that the injunction should be maintained to enable the court to decree payment to him for the improvements put upon the lots, even if a specific performance should be refused. There are two reasons why we do not concur in this view of the case, the first being that there is no prayer except for a specific performance, and second, if there were, there is no allegation in the bill of the insolvency of the *trust estate*; and if it be solvent, and has received and accepted the labor and material of the complainant in the way of improvements on the trust property, the same being real estate, we cannot see the necessity for any injunction in the premises for a proper enforcement of his rights.

Judgment reversed.

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PLANT vs. EICHBERG.

1. The discretion of the presiding judge in granting a first new trial will not be reversed unless some controlling principle of law, which demanded the verdict on the facts, has been misconstrued or misapplied by the court in making such grant.
2. A sheriff who levies a tax *fi. fa.* of less amount than \$100.00 need not make an entry of "no personalty" before levying on real estate.

New trial. Sheriff. Levy and sale. Tax. Before Judge HILLYER. Fulton Superior Court. September Term, 1879.

In October, 1872, Plant obtained a judgment against Thomas P. Fleming *et al.* In 1878 (being then controlled by deGraffenreid as transferee) the *fi. fa.* was levied on a certain lot in the city of Atlanta, which was claimed by Caroline Eichberg. Her chain of title was as follows: A deed from one Andrews to Fleming, dated September 11th, 1873. A deed from Fleming to Joseph T. Eichberg, dated December 21st, 1875. A deed from the sheriff to

J. T. McKey, trustee, under a tax sale, dated May 2d, 1876. This sale was made under a tax *fi. fa.* against Fleming for taxes for 1875, amounting to \$16.50, besides costs. McKey bought for \$24.40. The levy was made by the sheriff, who levied at once on this realty without making any previous entry of "no personalty." McKey, trustee, and his *cestui que trust*, made a quit claim deed to J. T. Eichberg, dated June 1st, 1876, for the amount which the lot cost him, and ten per cent. added. J. T. Eichberg conveyed the property to claimant October 29th, 1877. One of the principal points of contest was the regularity of the sheriff's levy and sale.

On this subject the court charged as follows: "Now in the rules and other proceedings of other judicial sales is the requirement that the constable shall make an entry of no personal property before he can levy on land. Now the act of 1876 says the sheriff must use the same proceedings. The court is of opinion that the levy is a part of the proceedings, and the court instructs you that unless you find entered on the tax *fi. fa.* that search was made and no personal property found, then you will find the property subject. If you find a valid judgment and lien, and that search was made and no property was found, then you will find the property not subject."

The jury found the property subject. Claimant moved for a new trial. It was granted, and plaintiff excepted. The other points made are not necessary to an understanding of the decision.

GEO. S. THOMAS; M. DEGRAFFENREID; T. P. WEST-MORELAND, for plaintiff in error.

JULIUS L. BROWN; M. J. CLARKE, for defendant.

JACKSON, Justice.

Under our repeated rulings, the first grant of a new trial will not be reversed by this court, unless some con-



trolling principle of law, which demanded the verdict on the facts, has been misconstrued and misapplied by the court on the grant of the new trial. So that the sole question in this case is this, did the court err in holding on a review of his charge to the jury when he passed on the motion for a new trial, that when a sheriff levies on real estate for taxes, he need not enter on the *fi. fa.* that no personal property could be found whereon to levy, for the verdict is right and the land is subject if such entry had to be made by the sheriff, there being none on the execution? We think that the court did not err. The reason on which our law forbidding constables to levy on land unless personalty was exhausted rests, is that those officers cannot sell land at all, but must turn over the levy to the sheriff when it is made; but as the sheriff may sell as well as make the levy, we cannot see why the rule should apply to him. And the Code—section 3645—in express terms confines the restriction to constables.

It is argued that the act of 1876—Sup. to Code, §129 *et seq.*—restricts the sheriff when he makes the levy to make the entry, because that act declares, "It shall be lawful for the sheriff or his deputy in any court of this state to levy and collect a tax *fi. fa.* for any amount: *Provided*, that when said tax *fi. fa.* is for one hundred dollars or less, the same fee shall be paid as is now allowed by law to constables or bailiffs; and all other proceedings as to levy and time and place of advertisement and sale, shall be the same as heretofore governed such levy, advertisement and sale by bailiffs or constables;" and the proceeding as to levy required the constable first to exhaust the personalty under section 3645 of the Code. The case in 11 Ga., 88—*Gladney vs. Deavors*—is cited to show that in tax cases such entry must be made. That decision rested on the tax act of 1804, Cobb's Digest, 1048; and the question is this, is that act still of force, and the decision in 11 Ga., 88, still the law on this point? It will be observed that under that act the tax collector could not

go upon land at all, no matter what was the amount of the tax, unless the personalty was exhausted; for it declares that "he shall proceed immediately against such defaulters by distress and sale of goods and chattels, if any to be found, otherwise of the lands of such defaulters." That is certainly not the law now; for the Code contemplates that land may be levied on at once for taxes, and the only restriction seems to be that constables are not permitted to sell land, but must return the levy to the sheriff for sale. Code, §§886, 887, 888, 889, 890; 40 Ga., 39.

We are not prepared, therefore, to say that the court erred in holding that the personalty need not be first exhausted and entry of that fact made on the *fi. fa.* before a sheriff can levy on land to pay taxes, though the tax execution be for a sum less than one hundred dollars; and this being the first grant of a new trial, we shall not control the discretion of the presiding judge in granting it.

Indeed the point is controlled by *Smith vs. Jones*, 40 Ga., 39, where it was held that to collect a tax *fi. fa.* for city taxes, the marshal need not exhaust personalty and make the entry; and if such be the rule as to city taxes, much more ought it to be as to state taxes. And so the opinion there construes the above cited sections of the Code, and covers fully this point.

Judgment affirmed.

GEORGIA PENITENTIARY COMPANY NUMBER TWO *et al.*  
*vs. NELMS et al.*

[JACKSON, Justice, being disqualified in this case, Judge SNEAD, of the Augusta circuit, was appointed by the governor to preside in his stead]

1. The legislature cannot, by resolution, change the obligation of a contract made under a previous act. But if they instruct a public officer as to his duties under the contract, such legislative expression of opinion as to what has been done, and the resulting duties of the officer, may be resorted to in determining the intention of the legislature in passing the act.

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Georgia Penitentiary Co. Number Two *et al.* vs. Nelms *et al.*

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2. Under the act of 1876, which provided for the lease of convicts by the governor, the Marietta and North Georgia Railroad Company had a paramount right to the services of two hundred and fifty convicts before they were distributed to other companies, provided it complied with the conditions made precedent by law to obtaining them. The chancellor properly left this question of fact to be passed upon by the jury.

Contracts. Laws. Penitentiary. Injunction. Before Judge LESTER. Cobb County. At Chambers. November 27th, 1879.

Reported in the decision.

HOPKINS & GLENN, for plaintiffs in error.

MCCAY & ABBOTT; ABDA JOHNSON; GEO. F. GOBER; W. R. PAWER, for defendants.

SNEAD, Judge.

The Georgia Penitentiary Number Two, and Georgia Penitentiary Number Three, seek to enjoin John W. Nelms, keeper of the penitentiary, from delivering to the Marietta and North Georgia Railroad Company, and said Railroad Company from receiving, any convicts, under the following resolution of the general assembly of 1879:

"*Resolved, etc.*, That the principal keeper of the penitentiary be, and he is hereby, instructed to furnish the Marietta and North Georgia Railroad Company two hundred and fifty convicts (including the able-bodied convicts they already have), competent to labor on a railroad, whenever said company gives such bond as may be required by law (if the same has not already been given), said convicts to be worked by said railroad exclusively for the benefit of said railroad company, as is provided under the act of 1876," etc.

The complainants allege that by the terms of their contract of June 21st, 1876, with his excellency, the governor, the state leased all its convicts (except the proportion that was to go to Penitentiary Company Number One), to them for twenty years from and after the 1st day of

April, 1879; that by this resolution two hundred and fifty convicts are taken away from them; and that said resolution impairs the obligation of their contract, and is therefore void.

1. The contract of lease of complainants, as well as the claim of the Marietta and North Georgia Railroad Company, is based upon the act of the legislature approved February 25th, 1876, entitled "An act to regulate the leasing out of penitentiary convicts by the governor, authorizing him to make contracts in relation thereto, and for other purposes."

The resolution of 1879 cannot add to or take away any rights of lessees existing under this act of 1876. It is but an expression of the views of the legislature as to what they thought they had done, and instructions to an executive officer as to what, in their opinion, he should do under this act; and it is a legitimate source to look to in determining the intention of the legislature in passing the act.

2. To determine whether said resolution impairs the obligation of pre-existing contracts made under the act of 1876, it is necessary to construe said act, to give effect to the words employed therein, and thus reach the intention of the legislature. And it is a cardinal rule in the construction of statutes that an act should be so construed that all parts thereof may stand together. This act provides that as the leases may expire under the act of March, 1874, the governor is authorized and required to farm or lease said convicts to one or more companies, or association of persons, upon compliance with certain conditions. But before any disposition is made of the convicts, the governor is authorized to furnish the directors of the Marietta and North Georgia Railroad Company, upon their application for the same, two hundred and fifty convicts, or so many thereof as they may desire, for the space of three years, or until the completion of the grading of their road, upon giving satisfactory obligation to feed, clothe and provide for the same.

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Georgia Penitentiary Co. Number Two *et al.* vs. Nelms *et al.*

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It is patent from this the first section of the act of 1876, that the legislature intended the Marietta and North Georgia Railroad Company to have the right to two hundred and fifty convicts before any other disposition by lease was made of them.

In paragraph first, of the first section, it provides for leases "for the space of time not less than twenty years," "to one or more companies," "or association of persons;" and the language of the second paragraph of this section commences and reads as follows: "Before any disposition is made of the convicts as contemplated under the provisions of this act (*i. e.* leasing to one or more companies), his excellency, the governor, shall be authorized to furnish to the directors of the Marietta and North Georgia Railroad, upon their application for the same, two hundred and fifty convicts," etc. This qualification in favor of the railroad before any other disposition could be made of the convicts; the proviso that the governor might lease to certain railroads, unless the convicts have been leased to the companies provided for and the Marietta and North Georgia Railroad; the further proviso in the same section authorizing leases to railroads and turnpikes, subordinate to the rights of the companies provided for and the Marietta and North Georgia Railroad; and still further, section second authorizing other leases, at the same time guarding with the usual proviso, and in the same connection, the rights of the Marietta and North Georgia Railroad; all show the plain and manifest intention of the legislature to grant to this railroad company the right to the services of two hundred and fifty convicts for three years, or longer, if necessary to complete the grading of the road. Such being the right of this company, it was entitled to receive that number of convicts, *provided* application for them was made before they were leased to other companies, and the requisite obligation delivered or tendered; and this right was paramount to that of all other lessees.

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Printup Bros. & Co. *vs.* Turner.—Turner *vs.* Printup Bros. & Co. *et al.*

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The penitentiary companies, therefore, took their leases *cum onere*, and subordinate to the rights of the Marietta and North Georgia Railroad Company, if the latter made application for the convicts and tendered bond before the execution of these contracts.

Whether the railroad company complied with the conditions requisite to entitle it to the convicts, is a question of fact which should be passed upon by a jury.

Under the law, the chancellor having committed no error in refusing the injunction prayed for, his decision is affirmed.

Judgment affirmed.

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PRINTUP BROTHERS & COMPANY *vs.* TURNER.

TURNER *vs.* PRINTUP BROTHERS & COMPANY *et al.*

1. Where a deed to lands is made to partners in the firm name, they nevertheless hold as tenants in common, and if, in the partnership name, they make a promissory note with mortgage on the land, and in the body thereof use the firm name, but execute it in their individual capacity, it is a proper legal conveyance from the partnership, as also from the partners themselves to the mortgagee, and it may be foreclosed against one, more, or all of the partners.
2. One member of the firm cannot convey, by deed or mortgage, partnership land, though in the partnership name and to secure a partnership debt, contracted within the scope of the partnership business, without authority or subsequent ratification by his copartners. Such an instrument conveys only his own interest, and though executed in the name of the partnership, if it be a mortgage, may be foreclosed as to the interest of the person who makes it.
3. When a suit is brought against copartners, or the survivors of a partnership, it is not necessary to declare against or pray process as to all the members thereof, and have a return of *non est inventus* as to those not served, in order to bind their interest in the partnership effects; in either case, the judgment binds the partners sued and served as to their individual property and all the property of the partnership.

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Printup Bros. & Co. *vs.* Turner.—Turner *vs.* Printup Bros. & Co. *et al.*

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Partnership. Title. Deeds. Mortgage. Before Judge UNDERWOOD. Floyd Superior Court. September Term, 1879.

This case arose upon a money rule against the sheriff for the distribution of the proceeds of certain property sold under execution. The facts were, in brief, as follows:

On May 22d, 1869, lot 118, in the Coosa division of the city of Rome, was conveyed to John Bones, John Brown, James W. Bones and John S. Bones, individually. On September 4th, 1872, lot 119 was conveyed to J. & S. Bones & Co., as a firm. On April 1st, 1874, "James W. Bones, John S. Bones, John Brown and John B. Dougherty, merchants and partners composing the firm of J. & S. Bones & Co.," executed to Turner a mortgage to secure the payment of a promissory note for \$17,500.00, due at twelve months, bearing interest at twelve per cent. per annum. The mortgage was signed by each partner individually, and the note by J. & S. Bones & Co. At the March term, 1879, of Floyd superior court, a rule absolute was obtained on the mortgage in favor of Turner against James W. Bones, John Brown and John B. Dougherty. At the same term, Printup Brothers & Co. and other creditors obtained judgments against the firms of J. & S. Bones & Co. and Bones, Brown & Co., and against James W. Bones and John Brown, as survivors of both firms.

John Bones, one of the joint owners of lot 118, was no party to any of the debts nor to any of the suits. John S. Bones was a party to all of the debts, but having died, was not a party to any of the suits.

The declaration of Printup Brothers & Co. was against "James W. Bones, John M. Bowie and John Brown, as survivors of J. & S. Bones & Co. (John S. Bones, of said firm, being now deceased), as makers, and of said county of Floyd, and James W. Bones, of said county of Floyd, and John Brown and John B. Dougherty, of the county of Richmond, state of Georgia, survivors of the firm using

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Printup Bros. & Co. *vs.* Turner.—Turner *vs.* Printup Bros. & Co. *et al.*

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the name and style of Bones, Brown & Co., of said county of Richmond (John S. Bones, of said firm, being now deceased), as indorsers." The process was headed by substantially the same statement of parties, and required the defendants to be and appear, etc. The verdict and judgment were against the defendants, as sued, for \$4,485.31 principal, \$128.00 interest to date, \$300.00 damages, and costs.

Lots 118 and 119 were sold under the execution of Printup Brothers & Co., notice being given that the mortgage lien would look to the proceeds, thus presenting an unincumbered title. The former brought \$3,100.00 and the latter \$2,100.00.

The court distributed the fund as follows:

Costs on execution of Printup Brothers & Co., . . . . .	\$ 32 85
Sheriff's commission and making deed, . . . . .	68 50
To mortgage <i>fi. fa.</i> of Seth Turner, . . . . .	3,067 77
To <i>fi. fa.</i> in favor of Printup Brothers & Co., . . . . .	943 56
First National Bank of Rome, . . . . .	677 20
To <i>fi. fa.</i> in favor of Rounsaville & Brother, . . . . .	211 17
To <i>fi. fa.</i> in favor of E. J. Stevens, . . . . .	198 95

Making in all the sum of . . . . . \$5,200 00

To this judgment Printup Brothers & Co. excepted, and say the court erred as follows:

1. In ordering and deciding that one-half of the three thousand and twenty-four dollars and ninety cents (being the proceeds or money raised from the sale of lot No. 118) should be applied to and paid on the mortgage *fi. fa.* of Seth Turner, or that any portion thereof should be paid on said mortgage *fi. fa.*

2. In ordering and deciding that three-fourths of two thousand and seventy-three dollars and seventy-five cents (being the proceeds or money raised from the sale of lot No. 119) should be applied to and paid on the mortgage *fi. fa.* of Seth Turner, or that any portion thereof should be paid on said *fi. fa.*

3. In holding and deciding that three thousand sixty-



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Printup Bros. & Co. *vs.* Turner.—Turner *vs.* Printup Bros. & Co. *et al*

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seven dollars and seventy-seven cents, the proceeds of the sale of said lots Nos. 118 and 119, should be applied to and paid on the mortgage *fi. fa.* of said Seth Turner, or that any portion thereof should be paid on the same.

4. In not holding and deciding that the proceeds and money arising from the sale of said lots Nos. 118 and 119 should be applied to and paid on the judgment and *fi. fa.* of Printup Brothers & Co., and especially in not holding and deciding that the money arising from the sale of lot No. 119 (sold as the property of J. & S. Bones & Co.), should be applied to and paid on the judgment and *fi. fa.* of Printup Brothers & Co., and other common law *fi. fas.* of equal priority or same date against said defendants.

5. In deciding and holding that the mortgage held by Seth Turner had been legally foreclosed, and that said mortgage *fi. fa.* had been duly and legally issued thereon, and in deciding that the said mortgage *fi. fa.* was a lien on said money in court arising from the sale of said lots or any part thereof.

Turner also excepted, and says the court erred as follows:

1. In awarding any part of the proceeds of the sale of city lots Nos. 118 and 119 to the payment of the costs of the *fi. fa.* in favor of Printup Brothers & Co., except so much as was necessary to pay for the levy and advertisement, when there was money enough in the sheriff's hands arising from other sales under the same *fi. fa.* to pay all the costs due on the same, not otherwise disposed of.

2. In not according to the mortgage *fi. fa.* in favor of Seth Turner the entire proceeds of the sale of said two city lots Nos. 118 and 119, in the Coosa division of the city of Rome.

3. In awarding any part of said proceeds to the *fi. fas.* in favor of the other claimants.

D. S. PRINTUP; DABNEY & FOUCHÉ; HALSTED SMITH,  
for Printup Brothers & Co. *et al.*

ALEXANDER & WRIGHT; J. BRANHAM, for Turner.

CRAWFORD, Justice.

The above two cases involving the same subject matter, and arising out of the same decision of the court below, were argued together and will be disposed of as one case.

The litigation arose over the distribution of a fund brought into court by the sheriff, under a sale made by virtue of certain *fi. fas.* in favor of Printup Brothers & Co. *et al. vs.* J. & S. Bones & Co. *et al.*, upon the following statement of facts, as we gather them from a very voluminous record:

City lot No. 118 in Rome, Georgia, was conveyed to John Bones, John Brown, James W. Bones and John S. Bones, May 22d, 1869. City lot No. 119, also in Rome, was conveyed to J. & S. Bones & Co., as a firm, September 4th, 1872, composed of James W. Bones, John S. Bones, John Brown and John B. Dougherty, who, as merchants and partners constituting the said firm, made to Seth Turner their promissory note for \$17,500.00, and to secure the payment thereof, also executed to him a mortgage deed to the said lots 118 and 119 in the said city of Rome. This mortgage conveyed to Turner the whole of No. 119 and three fourths of 118, as John Bones, who owned one-fourth interest in 118, was not a member of the firm of J. & S. Bones & Co., nor a party to the contract.

On the 19th of April, 1879, a rule *nisi* on the petition of Turner was granted, setting forth that James W. Bones, John S. Bones, then deceased, John Brown and John B. Dougherty, merchants and partners, using the firm name and style of J. & S. Bones & Co., had made and delivered to him the said note and mortgage, which rule was served personally upon Brown and Dougherty, and service acknowledged by J. W. Bones for himself and as member of the firms of J. & S. Bones & Co. and Bones, Brown & Co., upon which a rule absolute was granted at the March

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Printup Bros. & Co. vs. Turner.—Turner vs. Printup Bros. & Co. et al.

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term, 1879, of Floyd superior court, as against James W. Bones, John Brown and John B. Dougherty.

At the same term of the court Printup Brothers & Co. obtained common law judgments against the said firm of J. & S. Bones & Co., as makers of certain promissory notes, by serving J. W. Bones and John Brown, and against Bones, Brown & Co., as indorsers, by service upon the same partners. It was alleged in the declaration that John S. Bones was dead, who was a member of both firms, and that the others and John M. Bowie were the survivors, and against whom as such, and against the said firms respectively, judgments were rendered.

The sheriff levied the *fi. fas.* of Printup Brothers & Co. upon the lots 118 and 119, and it was agreed by Turner, the mortgagee, that he sell the title of J. W. Bones, John Brown and John B. Dougherty, unincumbered by the mortgage upon their interests therein. Lot No. 118 sold for \$3,100.00 and 119 for \$2,100.00. The mortgage *fi. fa.* and the *fi. fas.* of Printup Brothers & Co., with others, contest with each other the distribution of this fund.

To ascertain the lien which each *fi. fa.* has thereto, it is necessary to know exactly what the judgments bound, and what interests the defendants in *fi. fa.* had in the property sold.

The mortgage of Seth Turner having been foreclosed as against James W. Bones, John Brown and John B. Dougherty, it covered one-half interest in lot 118, that being the interest of James W. Bones and John Brown; and it covered three-fourths interest in lot 119, as James W. Bones, John Brown and John B. Dougherty each owned one-fourth interest therein.

The *fi. fas.* of Printup Brothers & Co. covered exactly this same property and the partnership interest of John S. Bones, deceased, in lot 119, but were all younger than the mortgage to Turner, whilst they and the judgment of foreclosure were obtained at the same term of the court. When the property thus levied on came to sale

under the agreement, the whole interest of James W. Bones and John Brown was sold in lot 118, which was just one-half thereof, the other half belonging equally to John Bones, who was not a party to any of the contracts or suits, and John S. Bones, who owned one-fourth individually and not in partnership. Of lot 119, the whole interest of James W. Bones, John Brown and John B. Dougherty was sold, which was three-fourths thereof, and as John S. Bones had a partnership interest in the other and remaining fourth, and was a member of the firms against which Printup Brothers & Co. had judgments, they fastened on his equity of redemption in that fourth, and it too was sold,

It is to be remembered that John B. Dougherty had no interest whatever in lot No. 118, and that John S. Bones, owning one-fourth of the same lot in his individual name, and not having been in life, nor having any representative served, his individual property was not bound and could not be sold under the common law or Printup Brothers & Co. *fi. fas.*

We think, therefore, that the mortgage *fi. fa.* was entitled to all the money subject to distribution from the sale of lot 118, and to all which lot 119 sold for, except such amount as John S. Bones' equity of redemption may have brought at said sale, if, indeed, it brought anything, as the mortgage still rests upon it, and all the property sold did not pay one-third of the amount due thereon.

We lay down the following legal principles as applicable to the points made in this case:

1. Where a deed to land is made to partners in the firm name they nevertheless hold the same as tenants in common, and if in the firm name they make a promissory note with mortgage on the land, and in the body thereof use the firm name, but execute it in their individual names, it is a proper legal conveyance from the partnership as also from the partners themselves to the mortgagee, and it

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Printup Bros. & Co. vs. Turner.—Turner vs. Printup Bros. & Co. *et al.*

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may be foreclosed against one, more, or all of the said partners.

2. One member of the firm cannot convey by deed or mortgage partnership land, though in the partnership name and to secure a partnership debt contracted within the scope of the partnership business, without previous authority, or subsequent ratification by his copartners. Such an instrument only conveys his own interest; and though executed in the name of the partnership if it be a mortgage, may be foreclosed as to the interest of the person who makes it. 1 Brock. 456; 1 Metcalf, 518; 15 John., 159; 3 McL., 27; Coll. on Part., 394; 61 Ga., 676.

3. When a suit is brought against copartners or against the survivors of a partnership, it is not necessary to declare against and pray process as to all the members thereof, and have a return of *non est inventus* as to those not served, in order to bind their interest in the partnership effects; in either case, the judgment binds the partners sued and served as to their individual property and all the property of the partnership.

Inasmuch, therefore, as there is no evidence in this record going to show that the equity of redemption of John S. Bones in lot No. 119 was sold for any given sum, and that the proceeds of the sale will pay less than one-third of the amount due on the mortgage of Seth Turner, it is ordered that the judgment of the court be reversed as to the distribution of the fund, and that the same be paid over on the mortgage *fi. fa.*, less the costs of the levy and advertisement under the *fi. fas.* of Printup Brothers & Co., and the expenses of the sale of said property.

Judgment reversed.

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Gerding, surviving partner, vs. Adams.

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## GERDING, surviving partner, vs. ADAMS.

To a suit on a note given for the purchase money of three mules, it is not matter of recoupment that the vendor had caused one of them to be sold under an attachment which was void because not based on any affidavit. If the sale was wrongful it was a tort. The attachment arose, not out of the contract, but out of a breach by the defendant himself.

Recoupment. Contracts. Damages. Attachment. Before Judge LAWSON. Putnam Superior Court. September Term, 1879.

Adams brought suit against Gerding, surviving partner, on a promissory note given for the purchase of three mules. Defendant pleaded, among other things, that the plaintiff had caused an attachment to issue and be levied on one of the mules, which was sold thereunder, and that the attachment was void because not founded on any affidavit. On this account defendant sought a recoupment against the plaintiff. On demurrer the court struck this plea, and this forms one of the assignments of error.

W. B. WINGFIELD; W. F. JENKINS, for plaintiff in error.

S. A. REID; M. W. LEWIS & SONS; CALVIN GEORGE, for defendant.

JACKSON, Justice.

This suit was on a note for \$330.00 for three mules, given by defendant's firm to the plaintiff. The only question pressed before us is whether, after the note fell due and one of the mules was attached and sold, the defendant could recoup, because of the fact that the attachment was wrongfully sued out, it not being sworn to properly or sworn to at all. The attachment had nothing to do

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The Board of Commissioners of Decatur County vs. Cox, sheriff.

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with the contract by which the defendant promised to pay for these mules and gave his note therefor, but was a remedy which sprang from the law of the land which gave the plaintiffs the right to attach it if the note was not paid. It would be curious if, after the defendant did not make any defense to the attachment on the ground of want of affidavit or otherwise, he should be allowed to recoup in damages for its being illegally sued out.

The mule attached sold for \$27.00, and the court allowed that as a credit on the note.

The verdict is right—at least the evidence is sufficient to support it. The defendant kept and worked the mules without complaint, so far as the record shows, and ought to pay for them. And the only point urged before us is that which arises out of the plea to recoup, because, in suing out the remedy the law gave him, the plaintiff made some mistake in regard to the affidavit.

That attachment did not arise out of the contract, but in violation of it by the defendant's not paying the note. It was a tort if wrongful, and separate from the contract, and could not be recouped against the note. Code, §§2910-2912.

Judgment affirmed.

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#### THE BOARD OF COMMISSIONERS OF DECATUR COUNTY vs. COX, sheriff.

Attendance upon court by the sheriff or his deputy, and the summoning of tales jurors, are both incident to the office of sheriff, and no extra compensation can be charged therefor. The practice on the part of officers of charging extra fees beyond those prescribed by law is strongly condemned.

Shenit. Officers. Before Judge WRIGHT. Decatur Superior Court. November Term, 1879.

To the report contained in the decision it is only necessary to add that Cox, sheriff, sued the county commissioners in a justice court on an open account for services



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of himself and deputy in attending upon court and summoning talesmen. The justice gave judgment for the plaintiff, and the case was appealed. It was submitted to the court without a jury. He rendered judgment for the plaintiff, and defendants excepted.

FLEMING & RUSSELL, for plaintiffs in error.

GURLEY & TOWNSEND, by brief, for defendant.

WARNER, Chief Justice.

The only question made in this case is, whether the sheriff of Decatur county is entitled to charge the county for services rendered in his official capacity other than is specified in the fee bill as declared in the Code. The court decided that he was, and the county commissioners excepted. The services for which the sheriff sought to make the county liable were: 1st, for five days attendance by himself and deputy upon the November adjourned term of the superior court in January, \$25.00; 2nd, for eleven days services of himself and deputy in attending upon the May term of the superior court, \$55.00; 3rd, for summoning 40 tales jurors at the May term of the superior court by order of Judge Wright, \$6.00—total amount \$86.00.

None of these items were either legal or proper charges against the county. The services for which he made these extra charges necessarily appertained to the general duties of his office as sheriff, imposed by law (Code, §361), and his compensation therefor is the fees specified in the fee bill for other enumerated services for which he is entitled to charge, but *no more*. The sheriff when he took the office took it with all its burdens for the emoluments annexed thereto as prescribed by law. The mischievous practice of officers charging for extra services over and above their lawful fees, is a great evil, and cannot be too strongly condemned.

Let the judgment of the court below be reversed.



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*Willis et al. vs. Foster, trustee, et al.*

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*WILLIS et al. vs. FOSTER, trustee, et al.*

1. The existence or non-existence of fraud is peculiarly a question for the jury. The question being whether executors and a trustee had combined to defraud certain beneficiaries of an estate by buying in property at the executor's sale at a price below its real value, and appropriating it to their own use, the jury having found that fraud did exist, the evidence being sufficient to warrant the finding, and the presiding judge being satisfied, this court will not interfere with his refusal to grant a new trial.
2. If executors fraudulently bought property belonging to the estate at their own sale, including both realty and personalty, and subsequently one of them sold his interest in the realty to a purchaser who took with notice, such purchaser would not be liable to the same extent as the executors, not being interested in the personalty and therefore not liable on account thereof.

Fraud. Administrators and executors. Trusts. Equity. Verdict. New trial. Before Judge LAWSON. Greene. Superior Court. September Adjourned Term, 1879.

The following, in connection with the decision, sufficiently reports this case :

Complainants, wife and children of John T. Willis, filed their bill against the defendants, alleging, in brief, as follows: R. J. Willis died October, 1866, testate, leaving plantation, stock, etc. L. B. Willis, J. H. Willis and S. B. Heard were executors. By the will they were required to sell all of the property. Complainants were entitled, by the will, to one-sixth of the proceeds of the estate, after paying debts. L. B. Willis was appointed testamentary trustee to receive the same, and on arrival of the children at the age of twenty-one to pay over so much as he considered right, reserving a sufficiency for the wife of J. T. Willis, one of the complainants. Defendants have failed to comply with the provisions of the will, and have appropriated assets of the estate. They sold the personalty of the estate in 1867, and bought in most of it. In 1867 the plantation was sold at public sale

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Willis *et al.* vs. Foster, trustee, *et al.*

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by the executors, subject to dower of widow of R. J. Willis, testator, and, by agreement between the executors, it was bid in by Strain for them at \$3,000. Its actual value was \$20,000, and annual rental was \$2,000. On same day the executors conveyed to Strain, and Strain at once reconveyed to them individually. No money passed in this transaction, and there was no change of possession. After such pretended sale the defendants claimed the property as theirs individually. Subsequently Heard conveyed his one-third away in fraud of complainants, and died insolvent in 1875. J. H. and L. B. Willis are insolvent. L. B. Willis has made no returns as trustee for complainants. They pray for discovery, account and settlement, cancellation of deeds, removal of trustee, receiver, etc.

Amendments: Making Inman, Swann & Co. parties defendants, alleging that they had notice that executors bought at their own sale. That executors were illegally discharged by the ordinary. That return of executors of \$4,343.00, paid by them to complainants' trustee, is untrue. That Inman, Swann & Co. are purchasers from Heard, with notice.

The complainants amend their prayer by asking to be allowed part of the \$9,000.00, the proceeds of the sale, and that the land may be subject to sale therefor.

Inman, Swann & Co. answered, in brief, as follows: They know nothing of death of testator Willis, his estate, will, executors, etc., nor of complainants' interest in the estate, or their application to executors for settlement, nor of the acts of the executors, nor of the sale of the land by the executors, though they are informed that it was duly made, advertised, etc.; that it brought its full market value; that the executors accounted for it at thrice its market value, or \$9,000 00, and that complainants, through their trustee, received their *pro rata* of the \$9,000.00. They know nothing of the doings of Strain and the executors. They allege that they bought from

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Heard his one-third, paying for it by settling a debt on Heard; that they purchased in the utmost good faith, and should not be affected by the acts of the executors, and that Heard and the Willisses were in peaceable, etc., possession since 1867. They deny fraud, collusion, etc., and that the land is worth \$20,000.00, or any such sum. They cannot answer interrogatories in the bill. They set up receipts given by trustee for complainants, and the final settlement and discharge of the executors. Defend also on ground of lapse of reasonable time in which sale could have been avoided; also claim seven years prescriptive title, and that complainants, before they can object to sale, must pay back what they have received.

They subsequently amended their answer, alleging as follows:

1. Final settlement of executors; that the land though sold for \$3,000.00, was accounted for to complainants and the other legatees at \$9,000.00, and that about \$4,000.00 was paid to complainants' trustee.

2. They pray that as none of the other legatees object, but on the contrary ratify the sale, and that before complainants can recover they must pay to Inman, Swann & Co. what Heard paid for his one-third, or \$3,000.00; and to J. H. Willis what he paid for his share, or \$3,000.00; and that, as complainants are non-resident and insolvent, and the resale will result in a loss, they should indemnify the defendants and place them in *statu quo*.

L. B. and J. H. Willis answered, in brief, as follows: Admit death of R. J. Willis, the will, qualification of defendants as executors, etc. Admit that after sale one-sixth of the proceeds were to go to complainants. Allege that defendants paid specific legacies and paid to L. B. Willis, trustee for complainants, \$4,343.00, as appears by returns, and it was charged to him on proper record. Deny confederation, fraud, etc. Allege that all that was done was for benefit of estate and at request of testator. Admit that personalty was sold in 1867 at full value and

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sale ratified by decree of superior court in 1870. Admit that the plantation was sold in 1867, on sixty days' public advertisement in three newspapers—*Augusta Constitutionalist, Chronicle and Sentinel*, and *Greensboro Herald*. That it was sold to Strain as highest bidder for \$3,000.00. Deny that the land was sold at a mere nominal price, or that it was bid in by Strain for defendants so that they could get it at less than real value. Allege that, to the surprise of the executors, the dower was given notice of (as it was supposed that the widow would take the bequest in lieu thereof), and that thereupon, for the benefit of the estate, they procured Strain to make it bring highest value by bidding it in. Admit that they really bought it at highest price at public sale. Allege that complainants' trustee received much more than complainants' part of the land at its highest market value, defendants accounting for the place at \$9,000.00. Deny its value was \$20,000, or rented value \$2,000.

By amendment J. H. Willis answered: Proceeding by complainants is not "in a reasonable time." That he has a good and sufficient title. That the land was accounted for at \$9,000.00, that complainants must pay J. H. Willis one-third, or \$3,000.00, and Inman, Swann & Co., assignees of Heard, one-third, or \$3,000.00.

The case was referred to an auditor, and exceptions taken to his report.

It is unnecessary to detail the evidence which was conflicting.

The jury found for complainants \$6,330.24.

Defendants moved for a new trial. It was refused, and they excepted.

JOHN C. REED; M. W. LEWIS & SONS; P. B. ROBINSON; HOOK & WEBB, for plaintiffs in error, cited 41 *Ga.*, 579; Code, §2608, 3229, 3263; 51 *Ga.*, 139; 55 *Ib.*, 25; 38 *Ib.*, 269; 8 *Ib.*, 241; 39 *Ib.*, 381.

A. G. & F. C. FOSTER; J. A. BILLUPS, for defendants,

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cited Code, §3151; 19 *Ga.*, 130; 13 Allen, 407; 61 *Ga.*, 131, 137; 47 *Ib.*, 589; 48 *Ib.*, 120; 49 *Ib.*, 622, 43 *Ib.*, 529; 49 *Ib.*, 473; Code, §2751; 41 *Ga.*, 186; 37 *Ib.*, 94.

JACKSON, Justice.

The wife and children of John T. Willis filed their bill in equity against J. H. and L. B. Willis, executors of the will of R. J. Willis, and L. B. Willis also in his character as trustee of complainants under said will. The complainants were left one-sixth of the estate of testator, and L. B. Willis was made their testamentary trustee to hold and manage it for them. S. B. Heard had been also one of the executors, but died, and the bill is prosecuted against the two survivors. The executors were directed to sell the estate, real and personal, which they did, buying the realty themselves, and portions of the personalty, through one Strain, as nominal purchaser of the realty, for \$3,000.00, who reconveyed to them on the same day for the same sum. They worked the plantation thus bought in partnership for several years, and receipted each other for their several shares of the estate—L. B. Willis giving his receipt as testamentary trustee for these complainants, and another receipt for his own family as their trustee. Heard sold his interest in the land, which was one-third, to Inman, Swann & Co., and at a subsequent stage of the case, the latter were also made parties to the bill as co-defendants. The bill is framed upon the idea that the sale to the trustees or executors by themselves was fraudulent, and complainants being minors, and never having received one dollar, either from the executors or from the testamentary trustee, had the right to go upon the land for their share of their grandfather's estate, and their mother for hers; and inasmuch as Inman, Swann & Co. bought the interest of Heard with knowledge of the sale of executors to themselves, it proceeded against them as also liable to complainants.

The whole cause was submitted to an auditor, who

reported thereon ; four exceptions were made to the report by complainants, all of which were sustained, and the jury found a verdict of six thousand and three hundred dollars for complainants, with lien on the land for payment thereof. A motion was made to set aside the verdict because it was contrary to certain charges of the court, to the law of the case, and to the evidence. The court below overruled the motion for a new trial, and the defendants excepted.

1. There was evidence sufficient, in our judgment, to sustain the finding on the exceptions to the report of the auditor. The main question was fraud or no fraud ; and by the law everywhere, ratified and reaffirmed by our Code, fraud is subtle, and circumstances, though slight, will be considered sufficient to uphold the finding of the jury thereon, it being a subject peculiarly suited to investigation by them.

Though the executors bought the land from Strain at what he bid it off, three thousand dollars, they accounted therefor to each other at nine thousand, thus showing that they themselves did not consider the price fair. These complainants, however, did not participate in the advantage of this additional price put on the land, for they got nothing from the estate, and will probably get nothing unless it be got from this land. They lived and still live in Arkansas, and a very large estate in which their ancestor left them an interest equal to that of the other legatees, has been swallowed up by the others in Georgia. The presiding judge having decided that the verdict is not contrary to his charge, and the entire charge not being set out in the record, we decline to interfere with the verdict on that account. So in regard to the evidence. There is enough to show that complainants were not dealt fairly with, and that all the executors should have looked to their interest so far as not to part with their share to a trustee, doubtful as to solvency, and to go into partnership with him in the land bought under very suspicious

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circumstances, and divided among themselves with nominal receipts for money to each other.

2. So far as the executors and trustees are concerned, we have no difficulty in affirming the judgment. But Inmann, Swann & Co., it strikes us, though chargeable with constructive notice, to say the least, of the purchase of the executors of *this land*, and therefore it may be, liable for the interest of the complainants in the land, or the proceeds thereof, are certainly not liable for their interest in the personalty of the estate, with which they had nothing to do.

As the verdict, therefore, makes no distinction between them and the other defendants, we cannot see that as to Inman, Swann & Co., it is not contrary to the evidence and the law, in that it is too large.

Inasmuch as complainants have received no part of the estate, as found by the jury, and found properly, we think they have nothing to tender back either to Inman, Swann & Co., or to the executors.

If the executors colluded with their trustee to defraud them, and he did defraud them, which the jury found, the trustee's receipt of the money is not binding upon them, even if he got it, which does not seem to be the case. This bill is against that trustee and the other executors, his confederates in fraud, and Inman, Swann & Co., who bought, knowing of the voidable purchase of the land. We incline, therefore, to think that the latter, being affected with notice when they bought from Heard, are responsible to complainants to the extent of complainants' interest in the land, which is one-sixth thereof, or its proceeds; and inasmuch as we cannot direct the verdict reduced, not knowing what is for land and what for personalty, or what part principal and what interest, we conclude to award a new trial to Inman, Swann & Co., and to affirm the judgment as to the others.



## ZIMMER vs. DANSBY.

A plaintiff in *fi. fa.* cannot tack the time land was held under a levy which was adjudged illegal to a subsequent levy, in order to prevent the four years' bar of the statute of limitations in favor of a purchaser without notice, even though such purchaser had litigated as a claimant under both levies. The Code omits the word "peaceable," qualifying the possession, found in the acts of 1822, and 1851-2, and it behooves plaintiffs in *fi. fa.* to subject land to the payment of their executions by legal levies before the bar of the statute attaches.

Claim. Judgment. Levy and sale. Statute of limitations. Before Judge BUCHANAN. Troup Superior Court. November Term, 1879.

Reported in the opinion.

B. H. BIGHAM; THOMAS H. WHITAKER, for plaintiff in error.

FERKELL & LONGLEY, by brief, for defendant.

CRAWFORD, Justice.

In August, 1867, Valentine Zimmer, having an execution against Joseph Saunders, caused the same to be levied upon his land. Saunders, so soon as he could, applied for and obtained a homestead in the land so levied, when the sheriff returned the *fi. fa.* to the office with an entry to that effect thereon. On the 19th of November, 1870, the land aforesaid was conveyed by Saunders and wife, with the approval of the ordinary, to Dansby, the present claimant, for a valuable consideration and without notice. The plaintiff in *fi. fa.*, on the 3d day of June, 1873, advertised the same for sale, and on that day Dansby interposed his claim, which was returned to the proper court, where the title was litigated until May the 23d, 1877, when the levy was dismissed and a judgment was entered



accordingly. The execution was again levied August 1st, 1877, when Dansby again renewed his claim, and it came on for final trial at the November term, 1879, of Troup superior court. There was a verdict for the claimant, a motion by the plaintiff for a new trial, which was refused and he excepted.

The controlling question in this case then and now is, whether the levy made August 1st, 1867, and dismissed May 23d, 1877, can be invoked to maintain a new levy made August 1st, 1877, as against a *bona fide* purchaser of the same land and who had held possession from November 19th, 1870?

It is insisted by the plaintiff in error that it can be so invoked where the purchaser claimed the land, and litigated the question of title with the plaintiff in *fi. fa.* until the levy was dismissed, for he thereby admitted the levy and is estopped from setting up his four years' possession against the plaintiff's right to sell.

On the other hand, it is contended that the first levy having been adjudged and pronounced illegal without any appeal therefrom, is conclusive as against the plaintiff, and that the same, with all its force and legal effect, is *res adjudicata*. The act of 1822, as also that of 1851-2, declares that no judgment shall be enforced by the sale of any real estate which may have been sold to a purchaser for a valuable consideration and without actual notice, if the purchaser has been *in peaceable possession* thereof for the statutory period named. Upon the adoption of the Code in 1863, the word peaceable was left out, and it now stands, *has been in possession* for four years. With what view it was omitted does not appear, but it behooves plaintiffs in *fi. fa.* to see to it that they so use them as to subject the land to their payment by proper and legal levies before the bar of the statute attaches.

In the case of Kendall *vs.* Westbrook, 54th Ga., 590, it was held by this court, that if the sheriff, without an order authorizing him to take a *fi. fa.* out of the court where a

ending upon it, took it and levied it, such levy so far as the *bona fide* purchaser was concerned, could not be used to affect his possession. That the entry of a levy by the sheriff on the property without proper notice, is not such a legal levy as to defeat a claimant's four years' possession. The legal effect of which is to declare that no *illegal* levy made within four years, will *per se* be sufficient to stop the running of the statute in favor of innocent purchasers.

Under review, the first levy was made August 1st, 1877, and dismissed May 23d, 1877, being adjudged to be insufficient, and no exception taken thereto, the claimant has this judgment declaring that the same is standing in his favor, and the same is conclusive. §3577, §4252. Had the plaintiff in *fi. fa.* writ of error instead of allowing it to stand, he would have had that judgment reversed upon the ground that the claimant is estopped from denying the levy. 54

When the first levy was dismissed, it carried it off the docket and the case followed it, leaving the plaintiff no exceptions or resort to a new levy. He did not. The claimant met him with a new claim, and the legal effect thereof the court could recognize none other than the levy of August 1st, 1877, and if Dansby were a bona fide purchaser for value, without notice, and had no possession from November 19th, 1870, which was four years ago, the lien of the plaintiff's judgment would stand. The verdict of the jury was correct, and the court committed no error in overruling the motion for a new trial.

It affirmed.

## BRENT vs. MOUNT.

1. Where, in a suit on a note signed by husband and wife, the **uncontradicted** evidence shows that the wife received no benefit, but **was** assuming the debt of her husband, a verdict against her is **contrary to law**. But if there is no assignment of error based on the verdict, this court will not grant a new trial on that ground.
2. Where husband and wife were both sued, and the wife appeared and pleaded, a plea filed by her husband for her was properly stricken, it not appearing that she resided out of the county.

Husband and wife. Verdict. Practice in the Supreme Court. Pleadings. Before Judge LAWSON. Monroe Superior Court. August Term, 1879.

Reported in the decision.

A. D. HAMMOND, by JNO. I. HALL, for plaintiff in error.

BERNER & TURNER, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants on a promissory note payable to L. Wolfe or bearer, for the sum of \$220.00, dated February 16th, 1875, and due first day of November thereafter. The defendant, T. Y. Brent, made no defense to the note, and judgment was awarded by the court against him for the amount thereof. The other defendant, Jennie Brent, pleaded that the note sued on was given for a debt of her husband, T. Y. Brent, which had been incurred by him long before she signed the same, that she signed it as security for her husband, and not for the benefit of her separate estate. On the trial of the case, the jury found a verdict against her for the amount of the note. A motion was made by Mrs. Brent for a new trial on the grounds therein stated, which was overruled, and she excepted.

uncontradicted evidence in the record fully sustains the defendant's plea, and assuming that the court has correctly (and there is no exception to it) acted as it was manifestly against the evidence and the law applicable thereto, and if the defendant had included grounds for a new trial either of those grounds, we should have reversed the judgment refusing a new trial in her motion.

But the defendant in her motion for a new trial did not except to the verdict on the ground that it was contrary to either the law or the evidence.

The only grounds of error complained of by the defendant in her motion for a new trial are, that the court refused to allow the plea filed by T. Y. Brent at the time of the trial, which he alleged "that said note was the property of the estate of the deceased until after its maturity, and that *this* estate was not indebted to the present plaintiff in said note until after said note was due, dishonored, and the plaintiff does not now believe that said pretended holder of said note was the *pro* holder of said note," and in not allowing the plea alleged in said plea to be proved by the defendant. The issue on trial was that made by the plea of the defendant, Jennie Brent, the other defendant, T. Y. Brent, who filed any issuable plea. The plea which he filed was for the benefit of Jennie Brent, the other defendant. If the plea was properly stricken by the court, it not appearing that Jennie Brent, who had filed a separate and distinct plea for herself, did not reside in the county in which the suit was pending. Code, §3449. When the plea of T. Y. Brent was stricken, there was no plea in the record to authorize the introduction of evidence to prove the facts alleged therein. There being no other grounds of error complained of in the motion for a new trial, it was properly overruled. This court can only consider and decide such errors as are complained of and specified in the bill of exceptions. Code, §4251. The judgment of the court below be affirmed.

## JOHNSON vs. THE STATE OF GEORGIA.

1. Motions for continuance are addressed to the sound discretion of the presiding judge, and that discretion will not be controlled unless abused.
- (a). Whilst on a motion for a continuance on the ground of the absence of a witness, it is not permissible to inquire what other witnesses will testify in respect to the subject-matter of the absent witness' testimony, yet a counter-showing may be made as to what will be the testimony of such witness himself, and to that end it is admissible to show what he testified on a former trial touching the same facts.
2. Even if at the same time and place one person was killed and another assaulted with intent to murder, an acquittal of the former offense would hardly be a good plea in bar of a trial for the latter. Certainly not when the homicide and assault occurred at different places.
3. When jurors are put upon their *voir dire* in criminal cases, only the statutory questions can be asked them. If further investigation is desired, they should be put upon the court as a trior.
4. What the person assaulted said, though half unconsciously, so soon as she was found on the day of the assault, at the moment of the restoration of sensibility, is part of the *res gestæ*, and admissible.
5. The charge of the court was a fair exposition of the law, and the verdict was not unsupported by evidence.

Criminal law. Continuance. Pleadings. Constitutional law. Jurors. Evidence. *Res gestæ*. New trial. Before Judge HILLYER. Clayton Superior Court. September Term, 1879.

On September 18th, 1878, Mrs. Farmer was murdered and an assault committed on her daughter, Miss Farmer, which came near resulting in another murder. Neighbors discovered the Farmer house to be on fire, and on going thither and extinguishing the flames, Mrs. Farmer was found murdered. On search being made, Miss Farmer was found about a hundred yards distant from the house badly injured. She had been struck on the head with some hard instrument, and seemed partially, if not entirely,

ous. Several witnesses testified that they did  
ve her conscious. She was taken up and carried  
use. When found she was groaning. She was  
o hurt her, and said nobody. On the way to the  
e several times ejaculated, "Oh, my poor head!"  
Julia!" It was some days later before full cons-  
s returned. Julia Johnson was indicted both for  
er of Mrs. Farmer and the assault with intent to  
Miss Farmer. On the trial of the murder case  
acquitted. When the other case was called, de-  
moved for a continuance. The grounds of the  
ere that she had relied entirely on R. S. Jefferies,  
o had represented her in the murder trial, to  
her also in this, and that he had only a short  
iously notified her that he could not do so, thus  
er unprepared with her defense; also, that cer-  
trial witnesses were absent. As to what those  
would testify, the state made a counter-showing  
g what they testified on the murder trial. The  
used the continuance.

ant filed a plea of former acquittal, based on the  
n the murder trial, claiming that the circum-  
pointing to her as the perpetrator (nearness to  
, possession of goods alleged to have been stolen  
house, etc.), applied alike to both cases. The  
ck the plea, on motion of the state's counsel.

ing up the jury, the defendant's counsel proposed  
e jurors questions other than those provided by  
ce. These questions pertained to their presence  
roner's inquest over Mrs. Farmer, or on the grand  
h found the indictment for murder, or at the  
eof. Counsel stated that they had just been ap-  
o represent the defendant, and had no other  
testing the competency of the jurors. They,  
disclaimed any known ability to disprove the  
of the jurors to questions put to them on their  
The court refused to allow the questions.

The court allowed the expressions of Miss Farmer at the time when she was found to be proved.

The entire evidence is not necessary to be set out. The chief point of contest in the case was the identity of the defendant as the criminal. On this point Miss Farmer testified as follows:

Witness had come to the house and was in the front porch and her mother in the front door, when defendant came and said she wanted to get some cherry bark, and defendant and witness went together to the tree on the bluff to get the bark—defendant carrying the chop axe—chopped off the bark, and they had just started back to the house, witness walking in front, when she was stricken, and remembered nothing more occurring then nor for a good while afterwards. She knows no one else was present but defendant and herself. She had seen defendant twice before, once at the well sometime before, and again a day or two previous to the assault when defendant came to the house to get butter and eggs. On all these occasions defendant had worn a Scotch homespun dress. She had never heard defendant called by name; had been told she lived on Calhoun's place. Witness usually wore spectacles—did not that day. Negro women looked as much alike to her as a gang of black-birds. She had failed to identify defendant on the murder trial when asked to point her out among three or four negro women, defendant being then dressed differently from what she had been on the previous occasions. She didn't want to make the same mistake again; her brother and others had told her what kind of clothing was now worn by Julia. She had seen but one negro woman inside the bar on coming in that morning; knew defendant was to be tried, and knew in reason that was defendant. Had kept her eyes on her so as to know her. Defendant had changed hats. Witness' memory had never been as good since she was wounded. She thought would never be again. She had a dizzy feeling in her head all the time. Learned on

her consciousness that defendant had been charged with the murder of her mother and the mother herself. She positively remembered that defendant was the person with her and who struck her. She lived at the same place fifty years. Did not remember when the railroad was built, nor when the war began, nor when Atlanta was captured, nor when the battle at Gettysburg was fought, nor when the negroes were freed. She was 15 years old.

The court was requested to give the following charge: "The jury can convict the prisoner on the testimony of Elizabeth Farmer, they must believe to the exclusion of a reasonable doubt that she positively remembered, as a fact within her own knowledge, the prisoner was the same person now on trial, and that she recognized the assault on her charged in the indictment." The court gave the charge, but further charged the jury to return a verdict therewith as follows: "But if you are satisfied that she had in her mind and memory a knowledge of the facts testified by her, and that she truly stated that she recognized the prisoner as the perpetrator of the assault, you would be authorized to believe such facts as to the prisoner. The inquiry as to each person testified to by the witness at the trial is, do you believe the witness? If you do not believe the witness, you would have no right to set aside the testimony of such witness." The jury found defendant guilty. She moved for a new trial, assigning error in each of the rulings set out. The motion was overruled, and defendant ex-

BOYNTON; C. W. HODNETT; J. A. ANDERSON;  
FORSEY, for plaintiff in error.

HILL, Jr., solicitor-general, for the state.



JACKSON, Justice.

The verdict in this case was guilty, a motion was made for a new trial, which was overruled, and the defendant excepted.

1. The first ground is that the court erred in overruling the defendant's motion to continue. Motions to continue are left in the discretion of the superior court to a great extent, and must be so left from the very nature of the business—the witnesses sworn, the defendant's manner, and all the circumstances of a *nisi prius* trial. The presiding judge can decide such matters much more satisfactorily and justly than we can, and therefore this court rarely interferes with his discretion in such matters.

The court in this case permitted a counter-showing in respect to what the witnesses would swear. In *Horne vs. The State*, February term, 1879, it was ruled that a counter-showing should not be allowed to the point that *other witnesses* would swear to a state of facts different from what the witness who was absent would swear; but this is not that case. Here the witnesses swear what *these* witnesses had already sworn on a former trial, and of course the presumption is that they will swear the same thing again. The statute allowing a counter-showing is broad, and while the judge may not try the merits of the case on an issue of continuance, and thus take from the defendant the right of trial by jury practically, yet he may try all such issues as the question of the *subpoena* of the witness, his sickness, his absence from the county, or what he would swear if present, drawn from what he did swear on another occasion when the same transaction was in question. And such is the principle intended to be announced in the case decided at the February term, 1879. Code, §3531.

2. The defendant pleaded former jeopardy in this, that defendant had been acquitted of the murder of the mother of the subject of this assault in the transaction which was the same in both cases. The plea was properly overruled

ken. Even if the mother had been killed at the place and place when and where the daughter was, it would not have been the same offense, and would hardly be held good; but the mother was in the house, the daughter some distance from the place assaulted, which puts this case beyond doubt. 68.

The rule is settled that no questions but those fixed by statute will be allowed, unless the juror is put upon the judge being now the trier; therefore the court refused to permit the questions outside of the statute asked the jurors on the *voir dire*—*Cox vs. The State*, and many preceding cases.

That the person assaulted said, though half unconscious so soon as she was found on the day of the assault, the moment of the restoration of sensibility, is the *res gestæ* and admissible. 32 Ga., 672.

The charge of the court, including his addendum to the defendant's request, appears to us to be a fair exposition of the law, and there is evidence enough to sustain the verdict. The question was whether or not the witness was present to the transaction, and who identified the defendant as her assailant was worthy of credit, her mind was not in a state of insanity, and the jury found that she was, the presiding judge affirms the finding, and the law, as we think, leaves us no option but to affirm it too. The verdict affirmed.

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#### CALDWELL *et al.* vs. MCWILLIAMS.

Where the court has jurisdiction of the person and the subject matter of the litigation, and the parties in open court enter into an agreement in relation thereto, which is recorded upon the minutes of the court, and approved by the judge, it is binding upon the parties. Especially is this so when four days elapse before a verdict, and the subject matter of the agreement, is taken without objection, and one of the parties has received a benefit under the agreement.

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 Caldwell *et al.* vs. McWilliams.
 

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2. Where a question of law arising under a given state of facts is submitted to the judge for his decision, the statement to him of what the facts are upon which he is to decide the law cannot be error.
3. Where counsel make statements in their place, they may be received without verification, unless the same is required by the opposing party at the time.

Contracts. Practice in the Superior Court. Evidence. Witness. Before Judge BUCHANAN. Spalding Superior Court. August Term, 1879.

The facts are reported in the decision.

HUNT & JOHNSON, for plaintiffs in error.

STEWART & HALL, for defendant.



CRAWFORD, Justice.

A *fi. fa.* in favor of S. B. McWilliams was levied upon certain land therein described, on July 5th, 1879, to which, on the twenty-sixth day of the said month, Emily C. Caldwell *et al.*, put in their claim. At the August term of Spalding superior court, and on the fifth day of said month, issue was joined on the claim, after which and on the same day an agreement was had and entered on the minutes, whereby a verdict was to be taken finding the land subject, though not to be sold until the first Tuesday in December thereafter, the plaintiffs in *fi. fa.* to pay all costs and all counsel fees. In pursuance of this agreement and four days after it had been made, the verdict was taken. Two days thereafter, to-wit: on the eleventh, a motion was made to set aside the verdict on the ground that "the claim was not ripe for trial inasmuch as it was returnable to the February term, 1880, of said court."

When the motion docket was being called to dispose of the cases in which there were no issues of fact, counsel for claimants and movants announced that he was willing for the case to be heard as it involved simply a question of law and was, whether a claim case returnable by law to

term, could be tried at a preceding one. The  
therefore heard a statement from the counsel of the  
on the motion to set aside the verdict and ren-  
the following judgment: "After hearing the within  
and the facts touching the transaction—ordered  
same be refused." To which judgment the coun-  
the movants excepted and says:

that the court erred in overruling said motion, be-  
the verdict being taken at a term prior to that at  
the case was returnable is void.

question of law only being made by the pleadings,  
error to pass upon a question of fact.

the court erred in considering the statements of  
as evidence, when the same was only made as  
explanations, and not intended as evidence.

where the court has jurisdiction of the person and  
subject matter of the litigation, and the parties in  
court enter into an agreement in relation thereto,  
is recorded upon the minutes, and approved by the  
is binding upon the parties. The more especially  
where four days elapse before a *verdict*, which  
subject matter of the agreement, is taken without  
in, and one of the parties has received a benefit  
the agreement.

where a question of law arising under a given state  
is submitted to the judge for his decision, the  
sent to him of what the facts are upon which he is  
the law cannot be error. Questions of law in  
tract to be passed upon by the courts would be  
an anomalous proceeding.

where counsel make statements in their place, they  
received without verification unless the same is  
d by the opposing party at the time. In this case  
ere received without objection and it would be too  
w to raise it; besides, their statements were not  
and probably not considered by the court in the  
nt rendered.

ment affirmed.

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Saulsbury, Respass & Co. *vs.* McCallum, executrix.

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SAULSBURY, RESPASS & COMPANY *vs.* MCCALLUM,  
executrix.

A husband and wife, with the approval of the ordinary, made a deed to their homestead, set apart under the act of 1868, to secure the repayment of money borrowed, and took a bond to reconvey on the payment of the money. They remained in possession. The creditors obtained judgment on the debt, filed a deed to the husband, and had the land levied on. An affidavit of illegality was filed. *Held*, that the homestead was not subject.

Homestead. Levy and sale. Before Judge PATE.  
Twiggs Superior Court. September Term, 1879.

Reported in the decision.

E. F. BEST, by M. DEGRAFFENREID, for plaintiffs in error.

No appearance for defendant.

WARNER, Chief Justice.

This case came before the court below on an affidavit of illegality to the levy of an execution upon a homestead in favor of the plaintiffs, and was submitted to the decision of the court upon the following agreed statement of facts: On the eighth day of April, 1874, the plaintiffs loaned to McCallum \$1,043.45, and on the same day took a deed from McCallum and wife to his homestead which had been set apart to him as the head of a family on the twenty-sixth day of March, 1874, with the approval of the ordinary thereon, to secure the payment of said loan. A bond to reconvey upon payment of the money was executed at the same time. The plaintiffs afterwards obtained judgment for their said debt, and then executed a deed conveying the land to McCallum, and filed the same in the clerk's office, and had an execution levied on it to satisfy their judgment. McCallum being dead, his wife, who was in possession of the

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Iverson, administrator, *vs.* Wilburn, administratrix.

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ad, filed an affidavit of illegality alleging that said  
 y had been set apart as a homestead, and was not  
 to levy and sale in satisfaction of plaintiffs' judg-  
 The court held and decided that the homestead  
 subject to levy and sale, whereupon the plaintiffs  
 d. This case comes within the principal ruled by  
 t in *Trammel vs. Roberts*, 55 *Ga.*, 383, and is con-  
 y it. This was not a suit to recover back the  
 ad, as provided by the act of February 26th, 1876,  
 was required to be brought within six months;  
 McCallum and his wife remained in possession of  
 estead until his death, and she has been in posses-  
 t ever since.  
 he judgment of the court below be affirmed.

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ON, administrator, *vs.* WILBURN, administratrix.

r to relieve against a mistake in equity must be exercised  
 ution, and to justify it the evidence must be clear, unequi-  
 and decisive as to the mistake. It must arise from ignorance,  
 e, imposition or misplaced confidence, and be unmixed with  
 nce. The present case does not present such a mistake as  
 ire equitable relief.

y. Contracts. Before Judge SPEER. Bibb Su-  
 court. October Term, 1879.

n, administrator of Iverson, deceased, filed his  
 nt Mrs. Wilburn, administratrix of Wilburn,  
 , alleging, in brief, as follows: On October 14th,  
 erson and Wilburn, both being then in life,  
 into a written agreement. It recited that the  
 ad that day purchased of the latter a certain tract  
 described by boundaries, "the said land to be  
 d at the expense of said Wilburn, and the number  
 ascertained, and for which the said Iverson is to  
 said Wilburn thirty dollars per acre, one-half to

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Iverson, administrator, vs. Wilburn, administratrix.

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be paid next Christmas, and the balance twelve months from that time; the notes and other evidences of said sale to be drawn up in form and delivered as soon as the said survey is made." Shortly afterwards Wilburn had a survey made, and reported to Iverson that there were 122 1-5 acres, for which he wished notes. Both parties believed this survey to be correct, and there was nothing to put Iverson upon inquiry, or cause him to suspect any mistake. The notes were accordingly executed for the amount due for 122 1-5 acres, to-wit: \$3,666.00. During his life Iverson paid \$1,452.00 on the purchase money, and after his death complainant paid \$400.00. Before he died defendant sued him for the balance of the purchase money due. He had a good defense, as has subsequently appeared, but was not aware of it then, and judgment went against him for the balance due. When complainant administered on the estate of Iverson, he found a balance of \$1,968 due on the *fi. fa.*, and being wholly ignorant of any defense thereto, he paid it off and extinguished it, or allowed it to be done. One B. V. Iverson bought some of the property subject to the *fi. fa.*, (it is first alleged at sheriff's, then at administrator's sale), and borrowed the money to pay therefor from one Strohecker. It was agreed that Strohecker should take a transfer of the *fi. fa.* from the plaintiff therein to secure him, which was accordingly made; subsequently, B. V. Iverson repaid the money, and Strohecker transferred the *fi. fa.* to him. Iverson, Jr., being both administrator and interested in the estate of his father, Iverson, Sr., and desiring to buy the land, agreed to pay the balance of the purchase money and take a deed to it individually; this trade was consummated, the *fi. fa.* extinguished by the payment of the money, and he individually receipted to himself as administrator for the amount so paid. He has settled with the estate. Thus matters stood until a few months before the bringing of this bill (1877) when complainant desired to sell a part of the land, and upon having

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Iverson, administrator, *vs.* Wilburn, administratrix.

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vey made, it was discovered that the former  
s erroneous, and instead of containing 122 1-5  
land only contained 105, thus making a differ-  
516.00, which was improperly paid. This bill  
within a few months of making this discovery,  
n four years from the last payment on the pur-  
vey.

yer was to set aside the judgment for purchase  
the extent of the mistake, and that defendant  
d to reimburse complainant to the amount of  
ayment.

ed to the bill were the written contract in re-  
e survey, the suit by defendant against Iverson,  
e balance of purchase money, a confession of  
thereon, "with stay of execution until Novem-  
872," made on January 22d, 1872, the *fi. fa.*  
pon such judgment, with transfers of it, and an  
tor's deed from complainant to B. V. Iverson.  
ant demurred to the bill for want of equity, be-  
mistake complained of was not such as to be  
by equity, being unmixed with fraud by defend-  
intestate, but being mixed with *laches* on the  
complainant and his intestate, and because it ap-  
the face of the record that the action was barred  
f time.

nurrer was sustained, and complainant excepted.

RUTHERFORD, for plaintiff in error, cited 1 Ch.  
; 23 *Ga.*, 477; 28 *Ib.*, 272, 287; Code, §§3118,  
5, 2642, 3117; 7 *Ga.*, 383; 13 *Ib.*, 88; 40 *Ib.*,  
Wm., 126; 29 *Ga.*, 651, 673-4; 23 *Ib.*, 352; 41  
1 *Ib.*, 172; 1 Story's Eq., 162; acts 1859, pamp.

& RUTHERFORD, for defendant, cited 13 Pet.,  
e, §§3129, 3178, 3577, 3826, 3828, 4220, 3588,  
4; 15 *Ga.*, 103.



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Iverson, administrator, vs Wilburn, administratrix.

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JACKSON, Justice.

This bill was filed by Alfred Iverson, as administrator of Alfred Iverson, Senior, against Mrs. Wilburn, the administratrix of Wilburn, deceased, for the purpose of setting aside a judgment confessed by Iverson, Senior, in his lifetime to said administratrix in June, 1872. The bill was filed in March, 1877. The ground on which it proceeds is that the judgment is founded on a land trade, in which Iverson, Senior, agreed to pay Wilburn, deceased, for a certain piece of land, bought in 1849, to be surveyed at the expense of Wilburn, at the rate of thirty dollars an acre, that there was a mistake in the survey by which the judgment was for too much, that it had all been paid, and the prayer is that the overplus be paid back to Iverson, as administrator. Both parties to the contract are dead. It is in writing. The survey was to be made to carry it out. No fraud is alleged against Wilburn, deceased. He handed the survey when made to Iverson. His offense hath this extent; no more. No reason is given why Iverson did not look into it at the time and see to it that it was right. While Wilburn was to pay for it, Iverson had rights equal to Wilburn to see to the survey and that it be done correctly. It seems to have been an innocent mistake of the surveyor, with no fault in Wilburn and no fraud on his part, and this mistake was not "*unmixed with negligence*" in Iverson. Code, §3129.

The power to relieve against any mistake in equity is very limited by our Code. It must be "exercised with caution, and to justify it the evidence must be clear, unequivocal and decisive as to the mistake;" "it must arise from ignorance, surprise, imposition or misplaced confidence." Code, §3117. To relieve against a judgment, the rule is still more stringent. This judgment too was confessed, and by the party to the contract in his lifetime, and on consideration of a stay of execution. The administrator of Iverson has settled with the estate, and that

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*Sheibley et al. vs. The Georgia Southern Railroad Co.*

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not interested but himself individually. The  
 been transferred, and other equities have inter-

contract was made in 1869, the judgment was con-  
 1872, payments were made on the contract be-  
 after judgment by Iverson, Senior, in life, and  
 administrator, to those who had bought the *fi. fa.*  
 administration. There seems to have been *laches*,  
 ce, all the way through. And in such cases  
 will not grant relief—especially against a judgment,  
 confessed for a consideration, to wit: a stay of  
 execution. 13 Peters, 268; 15 Ga., 103.

whole, we are clear that there is no error in sus-  
 taining the demurrer and dismissing the bill.  
 Judgment affirmed.

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*Sheibley et al. vs. THE GEORGIA SOUTHERN RAIL-  
 ROAD COMPANY.*

If error lies immediately to the grant or refusal of an injunc-  
 tion when a bill is dismissed on demurrer by decree either at  
 term or in term, there is no law authorizing a review of such  
 under the speedy remedy applicable to injunctions.  
 granted to withdraw bill of exceptions in order to have it  
 returnable to the next term of this court, thirty days from  
 decision of the chancellor not having yet elapsed.

*Pr. Injunction. Practice in the Supreme Court.  
 Term, 1880.*

error in the decision.

ANDER & WRIGHT; WRIGHT & FEATHERSTON,  
 plaintiffs in error.

L. S. PRINTUP, for defendant.

CRAWFORD, Justice.

The plaintiffs in error filed their bill returnable to the March term, 1880, of Floyd superior court, praying an injunction restraining the defendant from going, or trespassing on, over, or through their land until it paid to them the sum of \$1,250.00, with interest and cost, it being the amount which was recovered as damages for the right of way through their said land. An order *nisi* was granted by the chancellor requiring the defendant to appear and show cause on a day therein named, why the injunction as prayed for should not be granted. The hearing on this order was postponed from time to time until the first or appearance term of the bill.

The defendant had, before that time, under the order *nisi*, shown as cause why the injunction should not be granted, his several grounds, which were set out as a general demurrer to the complainants' bill, and which, having been called up during the said term, was, by consent of parties, heard, and after argument had thereon, it was ordered by the court that the injunction prayed for be refused, the demurrer to the bill sustained, and the cause dismissed. To this judgment and order complainants excepted, and sued out a writ of error under section 3213 of the Code.

Upon the calling of the case in this court a motion was made to dismiss on the ground that it was prematurely brought.

Whenever there is an application for injunction, and the same is granted or refused, a writ of error lies to such decision of the chancellor, and the same may be brought up immediately for review. But where a bill is dismissed on demurrer by a decree either at chambers or in term, no provision is made by law for the hearing and reviewing such judgment sustaining the demurrer and dismissing the bill. 44 *Ga.*, 634; 58 *Ib.*, 184; 63 *Ib.*, 437.

Before the judgment of the court in this case was

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McWilliams *vs.* Walthall *et al.*, executors.

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On the minutes, counsel for the plaintiffs in error  
 have to withdraw the bill of exceptions and have  
 it made returnable to the September term of this  
 and it being within thirty days from the decision  
 made by the chancellor it was so ordered. 55 *Ga.*,

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McWILLIAMS *vs.* WALTHALL *et al.*, executors.

A motion was made to set aside a verdict, and a bill filed by  
 grant which covered all the issues made by the motion and  
 the same object, there was no error in refusing to separate  
 issues and try the motion first. When a court of equity takes  
 possession of a case, it will retain possession for the purpose of  
 making a final decree upon the issues raised by both the bill and  
 in the nature of a cross-bill.

was brought in 1866 on a promissory note for the purchase  
 of land, to which defendant filed a plea under the relief act  
 of 1864, and a verdict was rendered "for the plaintiff the return of  
 the land," but it does not appear when it was rendered. A judg-  
 ment was entered on this verdict in 1870 to the effect that plaintiff  
 was entitled to certain described land, which the latter had  
 taken from him:

That the verdict and judgment are not void for uncertainty.  
 Evidence is admissible to show what testimony was submitted  
 and objection to the jury on the trial of a case, the validity and  
 effect of the verdict in which, as applicable to the pleadings, is  
 not in issue.

There was no error in this case which would authorize the grant  
 of a new trial.

Opinion. Practice in the Superior Court. Verdict.  
 Judgment. Evidence. New trial. Before Judge UN-  
 DERWOOD. Coweta Superior Court. September Term,

The report contained in the decision, it is only neces-  
 sary to add that the following were among the grounds  
 for motion for new trial:

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McWilliams vs. Walthall *et al.*, executors.

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(1). Because the court erred in refusing to take up for trial the motion on the common law side of the court to set aside the verdict and judgment, before hearing the equity case, which embraced the questions made in the motion.

(2). Because, after the amendment of the bill, the court declined to suspend the equity case and take up the motion and hear it first. [After the first refusal of the court to separate the issues, complainant moved to amend his bill by striking out that part which enjoined his motion to vacate; the amendment was allowed without prejudice to defendants, they having answered in the nature of a cross-bill. The case having begun, complainant moved to suspend it and take up the motion to set aside first. This was refused.]

(3). Because the court erred in allowing defendants' counsel to prove by oral evidence what issues had been submitted to the court and jury on the trial of the suit on the note. [Two witnesses testified that on such trial the issue was distinctly made and submitted to the jury without objection as to the return of the land or rendering a money verdict.]

(4). Because the verdict returned by the jury upon the common law trial is void for want of certainty.

(5). Because the verdict was contrary to law and evidence.

J. W. POWELL; W. A. TURNER; ROBERT S. BURCH,  
for plaintiff in error.

JNO. S. BIGBY; J. B. S. DAVIS, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants with a prayer for relief and injunction on the allegations contained therein. John H. Walthall, the original defendant, having died, his executors answered the

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McWilliams *vs.* Walthall *et al.*, executors.

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prayed for relief in the nature of a cross-bill. On of the case the jury found a verdict in favor of defendants for the land in dispute, and the sum of 50 for rent. The complainant made a motion for trial on various grounds, which was overruled, and complainant excepted.

Appears from the record that the complainant, on the December, 1859, gave his note to the defendants' for the sum of \$2,500.00, due the 25th of December, 1865, with interest from the 1st of January, 1860, for purchase of the land in controversy. On the 24th of December, 1866, the defendants' testator sued the complainant on the note, to which he filed a plea under the relief act of 1866, in which he alleged, amongst other things, that on the 26th of December, 1863 (before the note became due) he had tendered to defendants' testator Confederate money in payment of said note, which he refused to receive, to his great damage, etc. On the trial of that suit on the note, the jury found the following verdict: "The jury find for the plaintiff the return of the land and the sum of 50 for rent of suit." The defendant in that suit (the complainant here) made a motion for a new trial, which was overruled and the case was brought to this court on a bill of exceptions, and was dismissed, and the judgment of the court below affirmed by operation of law. The verdict is not dated, and it does not appear from the record of the suit before us in what year, or at what term of court, the verdict was rendered, but it does appear that the judgment thereon, that the plaintiff do recover four acres of land now in possession of defendant, and a writ of possession do issue therefor, is dated on the 1st of July, 1870. On the 21st of July, 1870, a writ of possession was issued on the judgment commanding the sheriff to dispossess the defendant and put the plaintiff in possession of the land, which was duly executed by the sheriff. Afterwards McWilliams, the defendant in the common law-suit, accepted a lease of the

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McWilliams *vs.* Walthall *et al.*, executors.

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land from Walthall, the plaintiff, and went back into the possession of the land as his tenant. At the September term of the court, 1870, the defendant made a motion to set the judgment aside on several grounds, alleging the same to be void. The defendant in the common law-suit then became the complainant in the present bill before the court in which he sought to have the judgment upon which the writ of possession issued declared a nullity, and that he recover back the possession of the land, and that the defendants in the bill be enjoined from enforcing the lease contract against him, etc. The injunction was granted, and upon this state of things the case came on for trial.

1. There was no error in the refusal of the court to split open the complainant's case and try the motion to set aside the judgment separately. When a court of equity takes possession of a case, it will retain the possession of the whole case for the purpose of making a final decree as to the subject matter embraced in the complainant's bill, as well as that in the defendants' answer in the nature of a cross-bill.

2. The main controlling question in this case is, whether the verdict and the judgment thereon in the suit upon the note requiring the defendant therein to return the land to the plaintiff, was void on account of defective pleading, or otherwise. In our judgment it was not. The verdict might have been more formal, but the reasonable intendment thereof was the land for which the note was given, especially in view of the defendant's plea of the relief act of 1868, and the state of things which existed at the time the case was tried.

3. There was no error in allowing the witnesses to testify as to what was proven on the former trial without objection as to the issues then submitted to the jury. 52 *Ga.*, 15.

4. Upon looking through this complicated and confused record, we find no material error in the rulings of the court that would authorize the granting of a new trial in this

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Rich vs. Colquitt, governor.

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The complainant has been in possession of the twenty years, and all that he has ever paid for own by the record, is fifteen dollars in Confederate

the judgment of the court below be affirmed.

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RICH vs. COLQUITT, governor.

gage on personalty must be foreclosed in the county of the ce of the mortgagor, if a resident of this state; and that it is closed should affirmatively appear from the records.

*fi. fa.* founded on a mortgage on personalty, which has not properly foreclosed, is claiming a fund arising from the sale of of the property under another *fi. fa.*, a new foreclosure, or an ment of the original proceedings by inserting an allegation sdiction, would have left the mortgage without a *fi. fa.* when erty was sold, and thus prevent the *fi. fa.* from taking the

rage. Jurisdiction. Lien. Amendment. Before LARK. City Court of Atlanta. December Term,

m Rich was security on a recognizance for the nce of one George McCullough to answer a crimi- ge. The recognizance was duly forfeited. The suing on said judgment was levied on thirteen of sweet potato brandy, as the property of William d on the first Tuesday in December, 1879, this was sold, and the net sum of \$664.69 realized m. On the day before the sale, Daniel Rich n the sheriff's hands a mortgage *fi. fa.* for a large his favor, and ordered the sheriff to hold up d. He did so, until ruled by the defendant in d in answer to the rule returned the Daniel Rich e, the affidavit foreclosing the same, and the e *fi. fa.*

mortgage of William Rich to Daniel Rich was May 31st, 1877, and was recorded October 11th,



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Rich vs. Colquitt, governor.

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1877, being after the judgment of forfeiture *nisi* in the case of *Colquitt, governor, vs. Rich*, but before the judgment absolute. The property mortgaged is described in said mortgage as follows: "All the wines and liquors in barrels and bottles and in cases, empty flasks, barrels, kegs and demijohns, also office fixtures, and everything pertaining to the liquor trade now in the store owned by said William Rich, 31 Alabama street, etc., . . . this mortgage to attach to any new purchases, if any, as the goods are sold."

The affidavit of Daniel Rich annexed to his mortgage, and which was the basis of the foreclosure thereof, nowhere declares that the defendant named therein resides in Fulton county. It was dated December 1st, 1879, and the sale occurred December 2d, 1879, under the Colquitt *fi. fa.* and levy. No notice was given at the sale of the foreclosure of the mortgage of the plaintiff in error, nor was any notice given of his intention to release the property sold from the lien of his mortgage, or of his intention to look to the proceeds of the sale for satisfaction, nor was there any agreement between the mortgagor and mortgagee and plaintiff in *fi. fa.* that the entire property should be sold, but the *fi. fa.*, as such, was put into the sheriff's hands with instructions to hold up the fund.

The court ordered the fund to be paid to the Colquitt *fi. fa.* Rich's counsel moved the court to continue the hearing in order that he might amend the affidavit of foreclosure and have a new *fi. fa.* issued. This the court refused. Rich excepted.

S. WEIL, for plaintiff in error.

HOWARD VAN EPPS, solicitor city court, for defendant.

JACKSON, Justice.

The question made in this case which must control it, is whether a mortgage on personal property must be fore-

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Rich vs. Colquitt, governor.

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closed in the county of the residence of the mortgagor, if a resident of this state.

1. The mortgage of Rich could not claim the money unless it had been foreclosed, inasmuch as he had not complied with the statute and agreed that not only the equity of redemption but the entire property be sold. Code, §§3973-4, 1967. Therefore, if not legally foreclosed and claiming the money as an execution, it had no standing in court; and if not foreclosed in the county of the mortgagor's residence, it was not in legal contemplation foreclosed at all, and the *fi. fa.* was not in existence.

It was ruled in 13th *Ga.*, 285, that even the judge of the superior court could not issue the judgment of foreclosure on an affidavit made before him in a county other than the mortgagor's residence, though in the circuit over which he presided; and in 54th *Ga.*, 167, it was again ruled that "the foreclosure of the mortgage on personal property was not valid, because it was not alleged that the defendant resided in Baldwin county, where the mortgage was foreclosed, at the date of the foreclosure, or where he did reside." So that the question is not open in this court. There is reason for the rule too. No notice is given of the foreclosure, and if the defendant lived in another county, the personalty might be sold under the mortgage *fi. fa.* before he knew a thing about it. If done in his county, he would be apt to hear of it, and then have the opportunity to defend it. Besides, the constitution contemplates that every resident of the state be sued in his own county; and the non-resident alone may be sued where you can catch him in mortgage foreclosures of personalty as in other cases. Code, §3971; 45 *Ga.*, 549; Sup. to Code, §651.

2. This point controls this case. It is unnecessary, therefore, to consider the other questions further than to say that another foreclosure would have had no effect so far as to claim this money, nor would an amendment have helped the plaintiff in error; because either an amend-

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Brumby, trustee, vs. Bell.

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ment of the affidavit, or a new start altogether, would have left him without a *fi. fa.* when the property was sold, and he could not claim the money which it brought under section 1967 of the Code, before cited.

Judgment affirmed.

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BRUMBY, trustee, vs. BELL.

Where a creditor by mortgage files his bill alleging that another senior creditor of the common debtor held but an equitable mortgage, though in the form of an absolute deed, that by reason of payments of usury made to him, his debt was nearly settled, that he was about to sell to an innocent purchaser, etc., and praying an accounting and the writ of injunction, the discretion of the chancellor exercised in granting the injunction until the hearing will not be controlled, the evidence submitted by the respective parties being conflicting.

Injunction. Usury. Mortgage. Before Judge HILLYER. Fulton Superior Court. April Term, 1880.

Reported in the opinion.

W. I. HEYWARD, for plaintiff in error.

M. J. CLARKE, for defendant.

CRAWFORD, Justice.

The defendant in error filed his bill in equity in which he alleged substantially that Marcus A. Bell, on the 12th day of December, 1872, borrowed from John W. Brumby, trustee, etc., \$2,500.00, for twelve months, and for which he was to pay interest at the rate of one and one-half per cent. per month. In order to secure the payment of the said \$2,500.00, he agreed to have McMillan & Snow, who were holding for him the legal title to a certain city lot in Atlanta, to secure them for borrowed money, to

the said Brumby a deed to the said lot, which he held as collateral for the debt until the same was

at the time of the making of the deed by McMillan & Brumby, a paper writing was also made, authorizing the said Brumby to collect the rents arising from the lot, pay himself \$37.50 therefrom, which was the balance on the said \$2,500.00, at one and one-half per cent. per month, and to pay over the balance to the said M. A. Bell. It was further stipulated in said paper writing, that if the \$2,500.00 were not paid by December 12th, 1873, the said Brumby was to insert his name in the deed, before that time was to be in blank, and have the deed recorded; give Bell a bond for titles under the law of 1872; the contract for the receipt and payment of the rents was to continue until December 12th, 1874, and if the debt were not then paid the deed was to become void. The complainant further alleges that the said Brumby did not abide by the contract, but before the expiration of the time, inserted his name in the deed, collected the rents, claimed the title, although he still retained the same.

On the second day of September, 1873, the said M. A. Bell, owing the complainant \$1,327.00, gave him his promissory note for that amount, and on the fourth day of September, 1874, executed to him a mortgage on this same city lot to secure the said debt. That the said Brumby has received upon his note large sums of usurious interest contrary to the law from the making of the contract, and that if the same were applied, as in equity it ought to be, to the payment of the principal and lawful interest, that the same could be discharged, and if not altogether discharged, that on a fair sale of the property, unclouded by the deed of the said Brumby under his said deed, that the balance due, if any, could be paid and the residue applied to the payment of complainant's mortgage debt. The competency of M. A. Bell is alleged, and that he has no

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Brumby, trustee, vs. Bell.

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means out of which this debt may be paid except from this property. That the transaction between J. W. Brumby, trustee, and M. A. Bell amounts to nothing more than a mortgage, the title in equity being in Bell, and he prays that the title may be inquired into and decreed to be in Bell, and that which is held by Brumby to be but a mortgage, that an accounting between Bell and Brumby be had as to the rents, and that the money so received be applied to the payment of the principal and interest, and the usury be purged. That the property be decreed to be sold and the proceeds applied to the payment of any balance due to the said Brumby, and the remainder to the payment of complainant's debt.

By an amendment to his said bill complainant alleges that the defendant, Brumby, is endeavoring to sell the property, and if it should pass into the hands of an innocent purchaser without notice, that the rights of complainant would be imperiled, and therefore he prays an injunction, which was granted by the court, and the defendant excepted.

The defendant relied before the chancellor as well as before this court upon the want of equity in the bill to dismiss the same, and thereby to prevent any injunction. Taking the facts as they are set out, we think that there is sufficient equity to entitle the complainant to be heard, and as the judge below in looking to the bill, answer and affidavits, held that the disputed questions of fact should be settled by a jury before he could intelligently pass upon the rights of the parties, we affirm the judgment.

## MARKS vs. HERTZ.

e a defendant in trover was arrested under bail process, and  
 l for a discharge under the act of August 11th, 1879, an order  
 rging him on his own recognizance, was not such a final judg-  
 as could be brought up by writ of error. The proper remedy  
 y bill of exceptions *pendente lite*.

ling of the court would work serious or irreparable injury to  
 rty against whom it was made before the termination of the  
 on a bill of exceptions *pendente lite*, the court should grant a  
*cedas* until the final disposition of the main cause.

ice in the Supreme Court. Practice in the Superior  
 Trover. Judgment. Before Judge SNEAD.  
 and Superior Court. October Term, 1879.

orted in the decision.

ALPH BRANDT; J. S. & W. T. DAVIDSON, for plain-  
 error.

ANK H. MILLER, for defendant.

NER, Chief Justice.

was an action of trover brought by the plaintiff  
 the defendant for the recovery of the possession  
 in property therein described, in which the plain-  
 le an affidavit requiring bail as provided by the  
 section of the Code. The defendant was arrested  
 sheriff, and pending the suit he petitioned the  
 of the court for his discharge from imprison-  
 under the provisions of the act of August 11th,  
 The judge, upon hearing the evidence as to the  
 ontained in the defendant's petition, discharged  
 on his own recognizance, whereupon the plaintiff  
 ed, and brought the case up to this court.

n the case was called for a hearing here, the de-  
 in error made a motion to dismiss it on the ground

that it was prematurely brought, the original suit being still pending in the court below. This case comes within the ruling of this court in *Ross, administrator, vs. Byrd*, decided during the present term, not yet reported. See Code, §4250. It was insisted on the argument that unless the judgment of the court discharging the defendant upon his own recognizance, can be directly brought up to this court for review, that the plaintiff's remedy under the 3418th section of the Code will be worthless. The plaintiff could have filed his interlocutory bill of exceptions, as provided by the 4250th section of the Code, and as the judge has the power conferred upon him by the 247th section of the Code, to grant writs of *supersedeas*, we think it would be his duty to do so when an interlocutory bill of exceptions is certified and signed to the judgment of the court, which, in its effect, would operate as an unfavorable or serious injury to the party excepting to such judgment, to be operative until the final hearing and disposition of the main cause or suit, inasmuch as it is always the duty of the court to protect and secure all the rights of the parties before it, so far as the same can be done consistently with the rules of law.

Let the writ of error be dismissed.

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THE ATLANTA AND WEST POINT RAILROAD *vs.* WYLY.

1. While negligence, as a general rule, is a question for the jury, yet where the statute makes a certain act, having a material bearing on the case, imperative upon the agents of a railroad company, the court may instruct the jury that proper diligence required such act. Thus, in a suit for damages to a dray by a train, at a street-crossing in a city, the negligence of defendant's agents being in question, there was no error in charging that proper diligence required the tolling of the locomotive bell in approaching a crossing.
2. In a suit against a railroad for injury to personal property in charge of plaintiff's agent, the rule of damages is this : If the injury occurred

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The Atlanta and West Point Railroad *vs.* Wily.

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by the agent's fault, there could be no recovery; if by the fault of the agent and the company, there could be a recovery diminished in proportion to the agent's fault; if wholly by the negligence of the company's agents, then there could be a recovery of full damages. Taken as a whole, this seems to be the charge of the judge's charge.

Verdict. Damages. Negligence. Charge of Court.  
 MARSHALL J. CLARK, Esq., Judge *pro hac vice*.  
 Superior Court. September Term, 1879.

The plaintiff sued the railroad for damages done to his dray by a train at a street-crossing in the city of Atlanta. The evidence was conflicting as to whether the train drove recklessly upon the track ahead of the plaintiff's train or not, and whether the agents of the railroad were at fault in approaching the crossing at an excessive speed, and in not ringing the locomotive bell, or in not giving warning of the coming of the train. In other things, the court charged as follows: "The duty of a railroad company to have the locomotive tolled as it approaches a crossing in which proper diligence includes such tolling of the bell."

The jury found for the plaintiff \$227.50. Defendant moved for a new trial, which was refused, and defendant's motion was denied. For the other facts see the decision.

HAMMOND, by COLLIER & COLLIER, for plaintiff

WYLY & ABBOTT, for defendant.

Justice.

The plaintiff sued the railroad company for damage to his dray and recovered; the company moved for a new trial which was refused, and it excepted. The usual charge was that the verdict is not sustained by evidence, and



against law on that account, were abandoned before this court. A witness may testify to the speed at which the train is moving according to his judgment, giving the reasons for his opinion; and it is for the jury to say how much weight such opinion is entitled to have. Therefore, a witness may give his opinion as to speed, based on the appearance, noise, etc., etc., of the train; but this ground was abandoned also before us.

1. The court charged the jury that it is negligence not to toll bells on passing and moving trains through a city or town. Such is the law; and whilst, as a general rule, questions of negligence are for the jury, yet where the statute makes the act imperative on the agents of the company, and the rigid enforcement of it is of so much consequence to society, the court may tell the jury the law, and that the omission to comply with it, if it was omitted, is negligence in the agent who neglects to do it. This statute—Supplement to Code, §311—is a substitute for the former one in regard to blowing the whistle, so far as towns and cities are concerned, and this court has decided that such neglect to blow is negligence. 24 *Ga.*, 75.

2. The other exceptions appear to us to amount to nothing in view of the entire charge. That seems to cover all the points, and to rule that if the accident occurred wholly by the drayman's fault there could be no recovery; if by the mixed fault of the drayman and the company's agents, then there could be a recovery, but diminished in proportion to the drayman's fault; if wholly by the fault or negligence of the company's agents, then there could be recovery of full damages. This we understand to be the law.

Judgment affirmed.

## SNOW vs. COUNCIL.

lien as against real estate must be foreclosed as provided of the Code, and in declaring for such a debt, the plaintiff, judgment and execution must set forth the lien.

Before Judge LAWSON. Wilkinson Superior October Term, 1879.

ed in the opinion.

VER, by brief, for plaintiff in error.

pearance for defendant.

D, Justice.

plaintiff in error, claiming to have as a laborer a lien against all the property of the defendant in error under section 1974 of the Code, proceeded before the court to foreclose the same by making the usual oath for enforcement of liens against personalty, and further in his affidavit, that his lien extended not only to personal property but *the land* as well, and to execution against the same. Upon the affidavit made and filed in the office of the clerk of the court, that officer issued a *fi. fa.* directing its levy on goods and chattels, *lands and tenements* of the defendant for the sum sworn to and costs. The same was returned by the sheriff, it was arrested by affidavit of the defendant and returned to the succeeding term of the court, where the illegality was sustained and the writ was dismissed, because the proceeding was not in conformity with the law authorizing the enforcement of liens against personalty, but informal and illegal.

The ruling and judgment of the court the plaintiff in error assigns the same as error.

The plaintiff in error asks that the writ be made operative and ef-

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*Chapman vs. Skellie et al.*

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fective, must be recorded within three months after the completion of the work, in the office of the clerk of the superior court of the county where the land is situated. When so filed and recorded the action for the money must be commenced within twelve months from the time the same is due, and in declaring for such a debt the claimant must set forth his lien and the premises on which he claims it, the verdict must set it forth and the judgment and execution awarded accordingly.

The plaintiff below under his pleadings showed that he had no such standing in court, and was properly dismissed therefrom with costs.

A statutory right, with a summary remedy to enforce it, must be followed strictly to be made available, and when done otherwise, it wants legal sanction and is without legal effect.

Judgment affirmed.

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CHAPMAN *vs.* SKELLIE *et al.*

1. The copy of the note sued on, attached to the declaration, may be amended so as to conform to the original.
2. A written instrument, though not good as a mortgage, may still form a part of the contract in which the note sued on was given, and as such follow the transfer of the note, and be admissible against the maker to show his agreement to pay counsel fees for collection, and not to plead failure of consideration.
3. Where the maker of a note agreed not to plead failure of consideration, unless he should give written notice to the holder on July 1st, in a suit after that date such plea should allege that notice was given or it will be demurrable. Besides, this plea was not verified.

Amendment. Mortgage. Contracts. Evidence. Promissory notes. Before Judge SIMMONS. Crawford Superior Court. March Term, 1879.

To the report contained in the decision it is only necessary to add that the note and written instrument which formed the basis of this suit were as follows:

Chapman vs. Skellie *et al.*

FORT VALLEY, April 11th, 1877.

On the 1st day of November, 1877, after date, I promise to pay Cubbedge, Hazlehurst & Co., or order, thirty dollars, at Fort Valley, Ga. Value received at maturity, to bear interest at the rate of twelve per annum.

(Signed) L. O. CHAPMAN, [L. S.]

Witness my hand and seal to Skellie *et al.*)

—Houston County.

On this day made a certain note for the sum of thirty dollars, to Cubbedge, Hazlehurst & Co., and due November 1st, 1877, I received, I hereby, for the purpose of securing said note and to secure the same, incurred for collection of the same, create and give to Cubbedge, Hazlehurst & Co. a mortgage on the following property now on — plantation, in — county, to-wit: — to pay all expenses incurred in the collection of this note and it is understood and agreed, that at any time before the maturity of said note, the same may be paid or discharged by the delivery of said middling cotton, said cotton to be ginned, baled and packed in good merchantable order at Fort Valley, Ga. If said note is not paid at maturity, then I lose the cotton option as above and it is further stipulated and agreed, that I will not plead lack of consideration on the note described in this mortgage, unless the holders or their agents written notice of such failure on the 1st day of July, 1877.

Witness whereof I have set my hand and seal this eleventh day of November, 1877.

(Signed) L. O. CHAPMAN, [L. S.]

Witness my hand and delivered )  
by me J. M. GRAY." }

J. M. GRAY, for plaintiff in error.

R. &amp; COLLIER, for defendants.

Chief Justice.

As an action brought by the plaintiffs on a promise made by the defendant for the sum of \$30.00, to the order of Cubbedge, Hazlehurst & Co., and by them to the plaintiffs, dated April 11th, 1877, due November 1st after date. There was an

instrument in writing attached to the plaintiffs' declaration signed by the defendant, which appears to have been intended as a mortgage to secure the payment of said note, but there was no property specified in it, so as to make it a valid mortgage. The defendant made a motion to dismiss the plaintiffs' declaration at the trial, because the word "order" was omitted in the copy note attached thereto. The court overruled the motion, and allowed the word order to be inserted in the copy note by way of an amendment, and the defendant excepted.

The court also allowed the plaintiffs' counsel to write across the face of said copy note the indorsement, as the same appeared on the original note, over the objection of defendant, to which he also excepted. The defendant objected to the introduction of the paper purporting to be a mortgage in evidence, on the grounds that it was not payable to the plaintiffs, and there had been no assignment or transfer of it to them, and because it was no mortgage; but the instrument contained the following stipulations: "I agree to pay all expenses incurred in the collection of this note by law, and that I will not plead a failure of the consideration of said note, unless I give the holders, or their agents, written notice of such failure on the first day of July, 1877." Which objections were overruled, and the defendant excepted. The defendant pleaded that "the consideration for which said note was given had totally failed, and was illegal and void, for that the same was given for the purchase of one thousand pounds of a commercial fertilizer, known as 'Whann's guano,' and that said fertilizer had never been inspected or analyzed by a chemist or inspector of fertilizers of the state of Georgia duly appointed, nor had said fertilizer ever been stamped or branded as required by law." The court, on motion of plaintiffs' counsel, struck the defendant's plea, and the defendant excepted. This plea of the defendant was not sworn to, nor had the defendant filed any other plea under oath. The jury found a ver-

the plaintiffs for the sum of \$30.00 and interest, per cent. for collection.

There was no error in overruling the defendant's motion to dismiss the plaintiffs' declaration, nor in allowing a copy note attached to the plaintiffs' declaration to be read so as to correspond with the original.

Although the written instrument attached to the declaration was not a mortgage, still it was a part of the contract which the note was given, and followed the transfer of the note, and was admissible in evidence in favor of the holder of the note against the defendant, to prove the payment as stipulated therein in relation to the payment of the note, and his defense thereto by way of plea. There was no error in striking the defendant's plea, as it failed to allege that the defendant had given notice to the plaintiffs, or their agents, written notice of the failure to pay the note on the first day of July, 1877, as stipulated in his written agreement attached to the note and the copy thereof. Besides, the defendant's plea was not timely, and if there was any error committed by the court in submitting the case to the jury instead of to the court for judgment for the plaintiffs, there being no objection to the defense filed under oath, but there was no exception taken to the verdict on that ground, and no motion for a new trial.

The judgment of the court below be affirmed.

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#### ROSS vs. THE STATE OF GEORGIA.

During the term at which a criminal case was tried, a consent was passed allowing defendant's counsel a definite time to file his motion for a new trial, and when the case was called at the succeeding term the grounds had not been approved, a discharge of the motion was proper.

Case in the Superior Court. New trial. Before the court. J. M. MONS. Bibb Superior Court. March Term,

To the report in the decision it is only necessary to add that the order was taken October 19th, 1878, allowing defendant's attorneys until December 1st to present the motion for approval. It was dismissed at the March term, 1879, being still unapproved.

BACON & RUTHERFORD, for plaintiff in error.

C. L. BARTLETT, solicitor-general, for the state.

JACKSON, Justice.

This case was tried before Judge Grice, who passed an order by consent allowing time to the movant to perfect his motion for a new trial by having the grounds thereof approved. The movant failed so to perfect his motion. At the next term the motion came on to be heard before Judge Simmons, who dismissed it because it had not been perfected pursuant to terms; and this judgment refusing to entertain, but dismissing the motion for a new trial, is the error assigned.

We see no error therein. The consent order was taken for the benefit of the movant and with his assent. If it had been made against his will, his only remedy would have been to file his interlocutory bill of exceptions, which he did not do; but as it was done with his consent he could not have done even that. He is now too late to object to that judgment, even if it had been illegal.

Inasmuch then as he failed to comply with an order of the court passed at his instance and for his benefit and convenience, we think that the court did not err in refusing to consider the motion and in dismissing it because not perfected pursuant to the order.

Judgment affirmed.

STON BROTHERS & COMPANY vs. MCCONNELL *et al.*

n a fertilizer known as "Stonewall No. 1," was imported in  
s, legally analyzed and inspected, and then taken from the  
nal packages, manipulated with land plaster and other ingredi-  
then sacked and sold without further analysis or inspection as  
newall No. 2," it falls within the prohibitory law of 1874.  
te given for such fertilizer is void even in the hands of a *bona*  
purchaser because based upon an illegal consideration.

tracts. Promissory notes. Consideration. Before  
HILLYER. Clayton Superior Court. March Term,

orted in the opinion.

. SPENCE, for plaintiffs in error.

L. WATERSON; J. D. STEWART, by H. C. PEEPLES,  
endants.

FORD, Justice.

The first question made by the record in this case is,  
er a fertilizer known as Stonewall No. 1, which was  
ted in casks or barrels and legally analysed and in-  
d under the laws of Georgia, and then taken from  
original packages, manipulated with land plaster and  
ingredients, then sacked and sold without further  
is or inspection, falls under the prohibitory law of

act declares "That it shall not be lawful to sell, or  
or sale, any fertilizer manufactured in this state, or  
ng into the state for sale and distribution, any ferti-  
manufactured beyond the limits of this state, unless,  
offering for sale, or the sale or distribution of the  
there shall be an inspection and an analysis made  
by the inspector appointed under existing laws in  
ounty where manufactured, or in the district or port



of entry where the same shall be introduced from without the state."

The fertilizer sold in this case was not the Stonewall, No. 1, which had been analyzed and inspected, but it was taken from the original packages manipulated—increased in quantity—and perhaps lessened in value by the addition of land plaster and other ingredients, then sacked and sold as Stonewall No. 2, without other or further analysis or inspection. The original inspection of Stonewall No. 1 cannot certainly be applied to the new article after its change so as to dispense with this wise and wholesome provision of the law. It appears to us that this was one of the cases contemplated by the law, and where the tests were to be applied to ascertain its value, and to show that it had the capacity to increase the production of the soil. True, it is known that one-third of the quantity added to the original was land plaster, but there were other ingredients, what were they? and what was the compound produced after these additions? These were the very questions intended by the legislature that should be answered by the analysis and inspection, and if not done, whosoever should sell, or offer to sell, the same would be guilty of a crime, and subject the party to the penalty provided.

2. The second and only remaining question is, whether, falling under the provision of that act, a promissory note given for the purchase money of this fertilizer constitutes such an illegal consideration as to make it void in the hands of a *bona fide* holder for value and without notice?

At the common law illegal considerations were those that violated the rules of religion, moral or public decency, and such as entered into an act which was contrary to a law of parliament and contravened the public policy; the courts in such cases would not lend their assistance for the enforcement of such a contract. Such considerations are never respected by the law, and contracts founded upon them are unanimously condemned.

public policy of this state was to prevent the sale of goods manufactured within or without its limits, that they were first analyzed and inspected, so as to protect the state to one of her greatest interests, and prevent the fraudulent imposition of spurious and worthless goods upon that portion of her people who pay full value in the dollar for every one they realize from the sale.

The court has passed upon the validity of such contracts between *the parties* thereto, and have held that they are valid.

In *Blackley vs. Leyden*, September term, 1879, not yet reported.

But to bring the common law principle out of view; indeed, to hold that under it illegal considerations do not vitiate contracts when they come in conflict with the rights of *bona fide* holders, yet when we turn to our legislature on the subject of their rights, we find that they are protected from all defenses that may be set up by the holders of notes, bills or drafts, except *non est factum*, illegality, immoral and *illegal consideration*, or fraud in the procurement thereof. Code, §2785.

Maintained in the argument that because the act of 1875 was framed expressly to declare such notes void, that they are thereby only void as between the original parties, the reply that the rule cannot be confined alone to the parties, but, if, by any other it is so declared; moreover, that the law even in such cases is "that when a statute or by *necessary implication* declares the instrument absolutely void, it gathers no vitality by its circulation, but is void as to the parties circulating it." Daniel on Negotiable Instruments, §197. If therefore driven to maintain that which we have always recognized as dangerous to the public, we feel that we should be abundantly sustained. For we see that it is in direct contravention of public policy, a violation of a penal statute making it a crime, and, in all, when we look to section 2785 of the Code,

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Davis, administrator, *et al.* vs. McLester.

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we must, and do, pronounce such contracts not only void between the parties themselves, but that "they gather no vitality by being put in circulation."

To hold otherwise would be to have them transferred as soon as executed, enabling parties claiming to be innocent, and perhaps really so, to collect money upon a consideration the foundation of which would have its existence in the positive violation of a criminal law.

Let the judgment be affirmed.

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DAVIS, administrator, *et al.* vs. MCLESTER.

1. Where in a proceeding to reform a deed at the instance of a daughter against the vendor and the administrator of her deceased husband, it appeared that the father of complainant paid the purchase money and the deed was made to the son-in-law, and the question was whether or not it should have been made to him as trustee for his wife, the death of the son-in-law did not prevent the father, who paid the money, from testifying as to instructions given by him to the deceased in regard to the manner of taking the title, while the latter was acting as his agent for that purpose.
2. The verdict is not contrary to evidence.

Witness. Evidence. Verdict. Before Judge CRAWFORD. Stewart Superior Court. October Term, 1879.

Reported in the decision.

J. F. POULSON ; PEABODY & BRANNON, for plaintiffs in error.

W. A. LITTLE, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants praying for the reformation of a deed conveying certain described property, made by Shipp to McLester, the husband of complainant, on the allegations contained

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Davis, administrator, *et al.* vs. McLester.

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in said bill. On the trial of the case, the jury found a verdict in favor of the complainant. A motion for a new trial was made on the grounds therein stated, which was overruled, and the defendants excepted.

It appears from the evidence in the record that Battle, who was the father of the complainant, paid the money to Shipp for the property mentioned in the deed, and, as the complainant alleges, with instructions to have the deed made to McLester, her husband, as trustee for her use and benefit, whereas the deed was made to McLester absolutely, contrary to the instructions of her father, who paid the money. There was no dispute as to the fact that complainant's father paid the money for the property, but the controverted question in the case was whether the deed, according to the instructions of the complainant's father, was to have been made to McLester in trust for the use and benefit of his wife, or whether it was to have been made to McLester just as it was made, without any trust for his wife.

1. One of the grounds of error complained of in the motion was in admitting in evidence the following testimony of Thomas W. Battle, over defendants' objections, McLester being dead, to-wit: "I then requested McLester to see if Shipp would sell his interest in the land and personal property and let me know, and if he would do so on fair terms I would buy it for the use and benefit of his wife, my daughter, and make his wife equal to him, and he could then run the whole place for their mutual benefit. I instructed him (McLester) to take the deed in his name as trustee for the use and benefit of his wife. I did intend it to be a gift to my daughter, and thought that it was all arranged according to my wishes." The original parties to the contract in issue on trial, as made by the record in this case, were the complainant and Shipp, McLester being only the agent of Battle to make the contract with Shipp for the use and benefit of the complainant, as he was instructed to do. This case comes within

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*Cabaniss et al., assignees, vs. Ponder, mayor, et al.*

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the principle ruled by this court in the case of *Lowrys vs. Candler, executor*, decided at the last term, not yet reported.

2. There is some conflict in the evidence as to how the deed was to have been made, but in view of the undisputed fact that Battle paid to Shipp through McLester, his agent, who negotiated the trade, \$3,066.75, for the property, it is not at all unreasonable or improbable that he should have given instructions to have had the deed made to McLester as trustee for the use and benefit of his daughter, as stated by him in his testimony, and corroborated by the evidence of Wooldridge, who appears to have been a disinterested witness. Therefore, the verdict was not, in our judgment, so strongly and decidedly against the weight of the evidence contained in the record as to authorize this court to interfere and set it aside, and it is very doubtful whether the verdict is contrary to the weight of the evidence when carefully scrutinized. There was no error in overruling the defendants' motion for a new trial.

Let the judgment of the court below be affirmed.

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*CABANISS et al., assignees, vs. PONDER, mayor, et al.*

1. The town of Forsyth issued \$30,000.00 in bonds, bearing two per cent. interest. It entered into a contract with P. & Son, brokers, to give them the use of bonds of the nominal value of \$7,500.00, provided they would keep \$7,500.00 more at par as a circulating medium in the town and redeem them when presented; when the town by taxation should redeem \$7,500.00, the other \$7,500.00 were to be delivered up to be canceled. P. & Son became bankrupts, having on hand \$4,900.00 of the bonds. The town claimed that these should be delivered up for cancellation; the assignees claimed them as assets:

*Held*, that the contract created a trust in the nature of a bailment, and when it became impossible for the bankrupts to comply with their contract, the town was entitled to recover the bonds.

*Cabaniss et al., assignees, vs. Ponder, mayor, et al.*

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material that the bonds in the hands of the bankrupts were identical ones delivered to them by the town. The contract nature contemplated a use of the entire issue and a return

brokers knew that more than the exact amount agreed upon was issued, and nevertheless received their part and went on with the contract, they could not afterwards complain.

cts. Trust. Bankruptcy. Bailment. Municipal Corporations. Bonds. Waiver. Before Judge HILL. Monroe Superior Court. February Term, 1879.

The report contained in the decision, it is only necessary to add the following: The town authorities claimed it was impossible for Pye & Son to comply with their obligations because of their total insolvency and bankruptcy. They therefore insisted that the bonds in the hands of the brokers should be delivered up for cancellation, and a injunction against their use. The assignees, assuming the depositors and general creditors, resisted this claim, claiming that the bonds should be delivered to the town for distribution. The defendants introduced testimony to show that the bonds on hand came from deposits in the usual course of trade, and could not be identified as specific bonds originally delivered to them; that they had agreed to withdraw from circulation \$1,500.00 of bonds annually, but had failed to do so, and that a total of \$900.00 of the bonds had been issued over and over and \$30,000.00. It appeared that the council were negligent from redeeming the bonds by a bill filed by them to enjoin the levy of a tax for that purpose; that Pye, one of the firm of Pye & Son, assisted in the sale of the bonds and knew of the extra issuance of bonds. The jury found for complainants. Defendants asked for a new trial on the following, among other

because the court refused to grant the petition of the assignees that the bonds be turned over to them as part of the assets of the bankrupts.

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*Cabaniss et al., assignees, vs. Ponder, mayor, et al.*

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(2). Because the verdict was contrary to law and the evidence.

(3). Because the court charged, in substance, that the contract was a bailment and governed by the laws of bailment, and any failure on the part of B. Pye & Son to carry out their part of the contract was a conversion, and gave the lender a right of action against the borrower. If the jury believe defendants have failed to comply with their contract and complainants have complied, complainants would be entitled to the injunction and to a decree, and if defendants have any of said issue in possession, requiring the same to be delivered up and canceled, although these funds in hand may have been placed with defendants as a general deposit.

The motion was overruled and the assignees excepted.

BECK & BEEKS; STONE & TURNER, for plaintiffs in error .

A. D. HAMMOND; T. B. CABANISS; H. C. PEEPLES, for defendants.

JACKSON, Justice.

The town authorities of Forsyth brought a bill in equity against Pye & Son, bankers in that town, to subject certain bonds to a claim of the town; the bonds were the remnant of bonds issued by the town authorities under an act of the legislature for the advancement of its educational interests, remaining in the vault of the bank after it broke and the bankers became insolvent, amounting to some \$4,900.00. Pye & Son went into bankruptcy, and the plaintiffs in error were appointed their assignees and made defendants to the bill, representing the depositors and general creditors of the bank; and the contest is, whether the town authorities are entitled to receive these bonds to be delivered up and canceled, or the assignees to take them for distribution among the creditors of Pye & Son. That question turns on a construction of the con-

*Cabaniss et al., assignees, vs. Ponder, mayor, et al.*

igation entered into by the town authorities Son. The legislature authorized the issue of e town, and the corporation contracted with n for and in consideration of the use of worth of the bonds to keep good \$7,500.00 other like bonds; and when \$7,500.00 were y the town, then the other \$7,500.00 were to d up to be canceled. The bonds bore interest t. per annum, and the bankers had the use of without interest. A similar contract was made r banking house in Forsyth for a like amount— ssue being \$30,000.00, and the use of half being e two banks to keep the other half good among of the town and those interested therein. The set out in full in the record, but the substance ut as above written.

trial of the case the jury found for the town, gnees made a motion for a new trial, which ed, and they excepted.

rolling question is, whether the contract makes as in equity, under the facts in the record, will complainants to have the bonds left in the ye & Son returned to them to be canceled?

cannot hold that the transaction makes technically ed a loan for use; because such a loan is under gratuitous," and "at the will of the grantor."

6. But nevertheless, we think it created a by Pye & Son obligated themselves for a valu- eration, to-wit, the use of bonds of the nomi- f \$7,500.00, to redeem when presented at their her \$7,500.00 in value of the bonds, and keep ating at par. This they have failed to do, and do, because they are wholly insolvent. The he bill is to lay hold on such of the bonds as hands of Pye & Son to have them canceled, conditions of the contract being that when the edeemed one-half, the other half should be de-



livered up for that purpose. Such had been done by the town authorities when the case was tried. It is true that when the bill was filed, the time had not arrived for the redemption of one-half by the town, but no complaint had been made by the bankers of the neglect of the town in such form as to bind the town, or to offer to rescind and annul the contract. When it became apparent that Pye & Son could not use the goods entrusted to them by the town for the purpose for which these bonds were entrusted, the town had the right to rescind the contract and to recover in equity the bonds which remained against Pye & Son, and consequently against general creditors, who stood in their shoes.

2. It is immaterial that these \$4,900.00 of bonds were not proven to be part of the identical \$7,500.00 entrusted to Pye & Son for their own use. They could not, from the nature of the undertaking, keep the identical bonds belonging originally to themselves, and for their use; for the contract contemplated the use of all the bonds as a sort of circulation in the town, and Pye & Son had the right to put them out for that purpose. The spirit of the agreement is to return the same in kind.

3. In regard to the over issue of bonds, and the complaint of Pye & Son that that relieved them, it seems a sufficient reply to say that it was made to prepare and put out the entire issue, and that they received their part with knowledge thereof, and went on with the business regardless of that fact.

Whilst therefore we cannot reconcile this case with our Code, as making a loan for use, yet it does make a *quasi* bailment in the broader sense of the definition thereof in §2058 of the Code, which declares: "A bailment is a delivery of goods or property for the execution of a special object, beneficial either to the bailor or bailee, or both; and upon a contract, expressed or implied, to carry out this object, and dispose of the property in conformity with the purpose of the trust." As to the particular sort

ent, we think it partakes more of the nature of a for hiring than a mere loan. For the contract is thereby "one person grants to another the enjoyment of a thing, or the use of the labor and industry, of himself or servant, during a certain time for a certain compensation." Code, §2085.

In these events, it is a trust—the trust has failed by the death and bankruptcy of the trustee, and the *cestui que trust* has the right to get back his own goods, which were holden and attempted to be converted to pay the trustee's debts.

Therefore, we think the verdict and judgment substantially right, and there being no special depositors of funds, that the equity of the town entitles it to the redemption and cancellation of the bonds. The judgment affirmed.

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#### PHILLIPS vs. LINDSEY.

The bare conclusion of a witness as to an agreement made between the parties should be excluded, yet, after stating the facts connected with the transaction, the witness may give his understanding of what he heard it from the parties themselves.

The examination preliminary to the introduction of secondary evidence of a lost original, is left largely to the presiding judge, and if he is satisfied and admits the secondary evidence, it must be a case of abuse of discretion to require the interference of the court.

The case made by the complainant involved only the conduct of the defendant as to the excess of certain notes turned over to him for satisfying complainant's indebtedness, whilst that made by the defendant was that all of the said notes were placed in his hands as collateral security to certain *fi. fas.* against complainant. If, by him, it was not error in the court to charge the jury as to the duty of the holder of collaterals, and not to construe the instructions to the duty of the defendant as to the excess of notes turned over and above the indebtedness of the complainant to

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Phillips vs. Lindsey.

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4. There being evidence to sustain the verdict, and the presiding judge being satisfied with it, this court will not interfere.

Witness. Evidence. Practice in the Superior Court. Charge of Court. Collaterals. New trial. Before Judge BUCHANAN. Spalding Superior Court. August Term, 1879.

Reported in the opinion.

BECK & BEEKS, for plaintiff in error.

STEWART & HALL, for defendant.

CRAWFORD, Justice.

Phillips, the plaintiff in error, sold 350 acres of land to John G. Lindsey in 1869 for \$2,000.00, giving him bond for titles, and taking twenty \$100.00 notes, ten due one month after date, and ten due at one and two years. In 1871 fifteen of these notes were sued to judgment. During the fall of 1872 Lindsey agreed to sell to Wm. A. Johnson one lot of this land for \$2,400.00, in four payments of \$600.00 each, the first to be paid in cash, the others in three annual instalments, due March 1st, 1873-'74-'75, subject, however, to the consent of Phillips, who held the title. On May 3d, 1873, all the parties met at Johnson's house to perfect the bargain. Phillips wrote the transfer for the 200 acres on the bond for titles which Lindsey signed. The cash payment of \$600.00 was arranged between Phillips and Johnson, one-half paid down and a due bill for the other half, and the three \$600.00 notes executed as agreed.

Early in the year 1875, the fifteen *fi. fas.* against Lindsey were levied upon his land, whereupon he filed this bill to enjoin the sale, and prayed a decree of cancellation of the *fi. fas.* upon the ground that they had been paid, and that Phillips execute a deed to the land. The bill alleged that it was agreed on the fifth day of May, 1873, that Phillips

ceive Johnson's notes in payment of Lindsey's mess, and account to him for any excess over; notes and *fi. fas.* were to be canceled, and a deed to him for that part of the land which he had; that Phillips had violated his contract by to give up the *fi. fas.* and notes and to execute

bill Phillips filed his answer, denying the making such contract and alleging that the Johnson were only taken as collateral security, and in no way to Lindsey or discharge the lien of the judgments and; that the contract was reduced to writing, in form of a receipt given at the time, read over and delivered to Lindsey, stating that they were taken as collateral security only; that in December, 1873, Lindsey gave the notes for extra interest for further indulgence, to be paid out of any funds or demands in his hands.

On these pleadings the parties went to trial, submitted evidence, the jury, under the charge of the court, returned a verdict for the complainant, the defendant moved for a new trial, which was overruled by the court, and he by his exceptions.

The grounds upon which the defendant relied were: That the court erred in allowing the answers of Asa Lindsey and Mrs. Johnson to be read to the jury, because they stated the understanding of the witnesses to the agreement made between the parties on the fifth day of May, 1873.

That the court erred in not sustaining objections to the proof of the contents of the written release, when the balance had not been accounted for.

That the court erred in submitting to the jury the question of the conversion of the collaterals received by the defendant from Lindsey, because there was no such issue raised in the pleadings. The question of the use and diligence in collecting the collaterals, should have been restricted to the excess of the Johnson notes over the amount

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Phillips vs. Lindsey.

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due on the *fi. fas.*, as complainant, by his bill, claimed only such an interest in the Johnson notes.

4. Because the verdict was contrary to the evidence.

1. The first ground in this motion is that the judge should not have allowed certain witnesses to have given their understanding of the contract between Phillips and Lindsey.

The bare conclusion of a witness as to an agreement made between parties should not be admitted; but the witness, after stating the facts connected with the transaction, may give his understanding of it as he heard it from the parties themselves; for there can be no testimony as to any fact except as the witness understands it, and to exclude it because the witness says his understanding was a particular way, would be to limit too narrowly the proof as to the subject matter of the controversy.

This principle was ruled more broadly, perhaps, than we have stated it by this court in 13th *Ga.*, 496: "A witness, speaking of a contract which he heard between plaintiff and defendant, testified thus: 'It was my understanding, and I believe of all interested, that if there should be any balance it should be promptly paid after receiving the account.' *Held*, that the evidence was admissible."

2. Should the court have sustained the objections to the proof of the contents of the written release referred to in the evidence? It being made to appear to the court that the release was in writing, Mr. McDaniel was introduced to account for the original, and testified that he knew that there was a written release of the liability claimed on the Johnson notes; that it was delivered to Mrs. Johnson, who went to north Alabama; upon cross-examination, he said he *knew* that she had gone from what he had heard; that pending the litigation she came in, and wanted some arrangements made about the land; we opened negotiations with Mr. Beck, who was of counsel for Phillips, which resulted in the land being turned over and the release given. A preliminary examination

sort must be largely left to the presiding judge, appears that the witness and Mr. Beck had been counsel of the parties in reference to this settlement of the Johnson land, from which he (Johnson) had received, and, as it appeared, to Sand Mountain, in Alabama, that the paper had been delivered to her, and she had left there, and, from the information received by the witness, had gone to north Alabama also ; so that the foundation was sufficiently laid to go into the contents of the paper.

The witness, however, insisted upon in the argument here, Johnson having been one of the original parties to the suit, that notice should have been served upon him to produce the paper, and that his being beyond the jurisdiction had no application in this case, as the notice upon the attorney would be sufficient. We fully recognize this as sound law, and hold it to be sound law. But in this case, when a subpoena was prayed against him, Phillips alone moved and answered, and the whole litigation was conducted as to Johnson, and carried on between Phillips and the complainant only. The issues made and submitted were alone as to them, and so was the verdict and decision. He could not, therefore, be considered a party as he stood at the hearing.

This ground of error is that the judge erred in submitting the question of the conversion of the collaterals to the jury by Phillips, that he should have confined it alone to the witness as to the Johnson notes over the amount due on the *first* mortgage. We are unable to see any error in that part of the charge. The rule of law governing the conduct of a creditor who receives collaterals to secure a debt is precisely the same touching the use made of them, and the diligence exercised in collecting them, whether the party receiving them is interested in the whole amount so secured, or only in the excess after the original debt is paid.

The last ground is that the verdict is contrary to evi-

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Rush, administrator, vs. Ross, administrator.

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dence, and we confess that an examination thereof does not establish satisfactorily where the exact truth lies. When we take the testimony of the complainant it appears to be with him, and when we take the testimony of the defendant it is left in very grave doubt whether it be so or not. The parties and the witnesses were known to the jury, their credibility, their opportunity to know the truth, their disposition to speak it, the motives under which they testified, their interest in the result, their manner and conduct upon the stand, are all elements entering into the verdict, and of which this court can know nothing except from the record; the presiding judge, too, has much opportunity to witness during the progress of the trial, many of those elements which go to establish truth, therefore, when the jury have evidence to support the verdict, and the judge is satisfied with it, we do not feel authorized to disturb it.

Judgment affirmed.

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RUSH, administrator, vs. ROSS, administrator.

1. In a suit on a promissory note, the wife of the maker was not rendered incompetent to testify that she had paid it for her husband, by reason of the death of the payee. Especially will this not be ground for new trial where there was no objection made at the time the witness testified.
2. Both parties announced their evidence closed, and court adjourned until the next morning. When it again met, counsel for plaintiff offered to read certain answers of a female witness, examined by defendant the day previous to interrogatories, taken out for her, the object being to contradict her oral testimony. It did not appear that she was then in court, or that any foundation had been laid for impeaching her.

*Held*, that this court will not interfere with the discretion of the court below in refusing to admit such evidence.

3. Where the general charge covers the law of the case, if special instructions are desired they should be asked for.
4. There was no error in overruling the motion for new trial in this case.

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Rush, administrator, *vs.* Ross, administrator.

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nce. Practice in the Superior Court. Charge of  
New trial. Before Judge UNDERWOOD. Floyd  
Court. September Term, 1879.

Rush sued Landers, administrator of Thompson,  
e notes and an account, aggregating \$706.01.  
nt pleaded tender, payment, and the scaling ordi-  
1865. Both parties having died, Rush, admin-  
was made the party plaintiff, and Ross, adminis-  
*bonis non*, the defendant. On the trial, Mrs.  
who was formerly the wife of Thompson, de-  
testified that she paid one of the notes sued on for  
and, he being absent in the army. After the evi-  
both sides was closed, court adjourned until the  
. Counsel for plaintiff, when court again met,  
o read certain answers of Mrs. Wimpee to a set  
ogatories previously taken out for her, in order to  
ct her evidence from the stand. This the court  
o allow.

ury found for plaintiff \$51.46 principal, and \$67.14

Plaintiff thereupon moved for a new trial, on the  
g, among other grounds:

because the verdict is contrary to law and the evi-

because Mrs. Wimpee was allowed to testify, Rush,  
e of the note concerning the payment of which  
fied, being dead. [It does not appear that her  
y was objected to at the time when it was given.]

because the court refused to allow the interroga-  
Mrs. Wimpee to be read.

because the court charged that the ordinance of  
(adding the ordinance) was intended to authorize the  
settle the indebtedness of parties arising upon  
made at any time from the first day of June, 1861,  
st day of June, 1865, upon principles of equity, and  
y might consider the value of Confederate money  
me, without explaining to the jury for what pur-



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Rush, administrator, vs. Ross, administrator.

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poses they might consider the value of Confederate money at any time other than that named in the contracts sued upon.

The motion was overruled and plaintiff excepted.

FORSYTH & HOSKINSON, for plaintiff in error.

DABNEY & FOUCHE; J. BRANHAM, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on three promissory notes for the aggregate sum of \$706.00 besides interest, made by the defendant's intestate, and on an account against him for \$7.43. One of the notes was for \$18.08, dated June 8th, 1861, and another for \$500.00, dated April 27th, 1862, and the third note was for \$80.50, dated October 9th, 1862, all of which were due one day after date. The account was dated in 1861. The defendant pleaded tender, payment, and the scaling ordinance of 1865. On the trial of the case the jury found a verdict in favor of the plaintiff for \$51.46 principal, and \$67.14 for interest. The plaintiff made a motion for a new trial on the grounds therein stated, which was overruled, and he excepted.

1. There was no error in admitting the evidence of Mrs. Wimpee as to the payment of the \$600.00 note for her then husband, W. R. Thompson, on the ground that Rush, the payee thereof, was dead. Mrs. Wimpee was not one of the original parties to the contract or cause of action in issue or on trial, and she was not called to testify in her own favor, and besides it does not appear from the record that her testimony was objected to at the time it was offered.

2. Nor will we interfere with the discretion of the court in refusing to allow an extract from the answers of Mrs. Wimpee to a set of interrogatories to be read the next

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Jones vs. The State.

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After the evidence had been closed the previous purpose of contradicting or impeaching her which she had given in person the day before, hearing that she was present, or that any foundation laid for its introduction.

The court gave in charge to the jury the whole of the evidence of 1865, relating to the contracts sued on, and there was no error because it did not do more.

Under the provisions of that ordinance, the jury had discretion in settling the equities between the parties in the case, especially if they believed the \$600.00 had been paid, as they had the right to do under the ordinance, and therefore we find no error in overruling the motion for a new trial.

The judgment of the court below be affirmed.

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#### JONES vs. THE STATE OF GEORGIA.

Where there is no evidence of confessions in a criminal case, it is the duty of the court to charge that confessions are to be received with caution.

It is not sought to charge a prisoner by reason of sayings of his in regard to the crime for which he is tried, and acquiesced in the evidence, such sayings must have been in his immediate presence where he could hear distinctly all that was said; otherwise they would be inadmissible.

The name by which a deceased person was generally known is a material designation in an indictment for his murder, though he may have had another name. The question of name is for the jury.

Where the evidence presents solely the question of murder or innocence, the court need not charge concerning the other grades of homicide.

Law. Charge of Court. Evidence. Before the Superior Court. OGD. Randolph Superior Court. November 9.

Jones was indicted for the murder of Hamp Jones, his step-son, a child about six years of age, and on the trial was found guilty. He moved for a new trial on the following, among other grounds:

(1.) Because the court charged that confessions must be received with great caution, when there was no evidence of any confessions.

(2.) Because the court admitted in evidence sayings of the wife of defendant in regard to the crime, some of which did not appear to be in his presence. [The officer who arrested defendant testified that he arrested both defendant and his wife; that she stated that on the night when the murder was charged the child had been put to bed, and water poured on the fire; that her husband locked the door and gave her the key, and they started to church with others; that on the way—at the gate—defendant told them to go on, he wanted to stop, and would overtake them; that he stopped and shortly afterwards overtook the party. Some of her statements were made on the way to the jail, others after they reached it; some were in the presence of defendant, others not; but he and his wife were in adjoining cells, and as the officer started out of the door, he heard defendant tell his wife she had better mind how she talked. These statements of the wife were objected to. The court held statements of the wife not admissible unless made in the presence of the husband; but he let the occurrence in the jail go to the jury in connection with defendant's warning to his wife, leaving them to judge of his opportunity to hear and reply.]

(3.) Because the court charged that if a conviction or acquittal under this indictment would be a bar to a subsequent indictment for the murder of Hamp Culbreth, the objection on the score of name was not good; if it would not be a good reply to such indictment, the objection would be good. [The deceased was the bastard child of defendant's wife before he married her. The evidence

her name when the child was born was Charity that his father's name was Adam Culbreth, that was simply known as Hamp up to the time its married defendant, and after that was called [s.]

use the court stated to the jury that he did not think it necessary to give in charge the law touching the different grades of homicide, as in his view of the case there could be no intermediate verdict between guilty and not guilty. [The evidence showed that the body of the deceased was found in the fire-place, and indicated from the position of the person and bed that the deceased had been strangled with a cord, and the body placed in the fire to consume the marks. The defense was that the deceased was killed by the fire and was burned to death. There *was* a possibility of intending to reduce the killing, if defendant

the motion was overruled, and defendant excepted.

V. C. WORRILL ; R. E. KENNON, for plaintiff

W. C. FLEWELLEN, attorney-general; JAMES T. FLEWELLEN, attorney-general, for the state.

Justice.

Defendant was indicted for the murder of a child named John, the little son of his wife, was found guilty, and sentenced to death. The case was before us at the last term, and a new trial was granted. It is now before us again; and the court demands the grant of another new trial.

On the grounds of the motion for the new trial, the court erred in charging the jury on the basis of the confessions of guilt when there were none. In *The State*, decided last term, it was ruled that a defendant had made no confessions of guilt, and the court charged that confessions of guilt should be

received with great caution, it was such error that a new trial ought to be granted; and in that case, as in this, it was the second application for a new trial. The ruling in that must control this case. To charge upon an imaginary state of facts not in proof is error; because the jury may be misled to believe that the court was of the opinion that the case turned on facts in testimony which had escaped their attention; as in such case as this—that the defendant must have confessed that he was guilty, because the judge said so, and cautioned the jury to look carefully into the confessions and receive them with great caution.

2. As the case must be tried again, we wish to say further that the sayings of the wife of defendant, not in his presence, are clearly inadmissible, as ruled by the presiding judge as we understand his ruling; but we are not able to discriminate, as the evidence is transmitted to this court in this record, what she said in presence of the defendant and what she said when not in his presence. To admit them against the defendant, we are clear that they should have been said by her in his immediate presence, and where he could distinctly hear all that she said, and not that he should have been in an adjoining room or cell, where he could not hear all and have his direct attention drawn to what she said. The principle on which such testimony is admissible at all is, that by not denying or explaining what is said in his presence touching a transaction in which he is interested, the party interested acquiesces in the truth of the statement. Before he can be considered as acquiescing by silence he must be where he can hear and understand what is said, and the witness against him must be certain thereby that his attention was arrested by the narrative given of what had occurred in a transaction in which he was an actor.

3. The question as to the name of the child killed was a question for the jury, and whatever name he was generally known by was his proper designation in the indictment, and the evidence is clear that the name set out in

ment is that by which he was known in the hood.

his child came to his death by being killed by son, it is a clear case of murder, and manslaughter-grade or species of it, did not enter into the ion; and the judge was right not to encumber and confuse the issue before the jury by explanation of manslaughter and the line of distinction t and murder.

estions are but two: First, did this child fall into accidentally and thus die, or was its life taken by ion? And second, if some person killed him, was ant that person? These questions appear to have ly and fairly given to the jury without substant- by which defendant could have been hurt.

ard the new trial because the case of *Dumas vs.* absolutely covers this on the point of the charge bject of confessions of guilt, when there is no hat the defendant ever made any confession at ecause some of the statements of the wife of appear to have been admitted in evidence when made not in his presence. If any were made sence, those should be admitted on the next made when he was not presents should be exclu-

ear to say anything on the facts of the case, e new trial should be had, and the verdict ren- from any intimation of our opinion in regard lt or innocence of the accused.  
nt reversed.

## PAUL vs. THE STATE OF GEORGIA.

1. Where defendant voluntarily confessed to the killing of a girl nine years of age, in substance, as follows: that he killed her with a fence-rail because she told a lie on him the day before; that she followed him down to the spring and he got some switches and whipped her for it; that she ran up the hill to a haw-tree and cursed him, when he followed her, got a switch, and whipped her again; that when he started off she cursed him again, and he got a rail from the fence, went back and knocked her on the head three times and she died; and the evidence disclosed that the body of the deceased was found near the spring, the skull fractured by blows such as a rail would have made, and by it peach-tree switches frazzled and worn, and a fence-rail with blood on it, the end being broken off:

*Held*, that the confession was so thoroughly supported by corroborating circumstances of the *corpus delicti*, that this court will not interfere with the verdict of guilty of murder.

2. Where the evidence is not definite, that the defendant was fourteen years of age or over, but strongly points to such being the fact, and is clear as to his capacity to understand the distinction between good and evil, and as to his bad temper and character, and the jury find him guilty, and the presiding judge affirms the verdict upon motion for new trial, this court will not interfere.

Criminal law. Confessions. Evidence. New trial. Before Judge CRISP. Macon Superior Court. December Term, 1879.

This case is reported in the opinion.

B. B. HINTON; A. A. CARSON; J. L. MCCRARY, for plaintiff in error, cited, on capacity to commit crime, Code, §§4294, 4295; Whart. Am. Crim. Law, 97, 107; 5 Law Reports, 364; 5 *Ga.*, 310; 45 *Ib.*, 58. On confessions, Code, §§3792, 3793; 43 *Ga.*, 256; 23 *Ib.*, 297; 11 *Ib.*, 226; 20 *Ib.*, 60; 45 *Ib.*, 58; Ros. Crim. Ev., 144.

R. N. ELY, attorney-general; C. B. HUDSON, solicitor-general; JOHN R. WORRILL, for the state, cited on ca-

*Ga.*, 310; 10 *Allen*, 398; 1 *Hale's P. C.*, 22, n. *Crim. Prac.*, 10; 1 *Russ. on Crimes*, 4; 136. On confessions, 56 *Ga.*, 44; 57 *Ib.*, 478; 5, *Halstead*, 163; 1 *Southard*, 263; 31 *Ala.*, 100; 1 *Green's Crim. Law R.*, 398.

, Justice.

Paul was indicted for and found guilty of murder. He submitted a motion for a new trial on the following grounds:

1. That the verdict is contrary to the law of the case.

2. That the verdict is contrary to the weight of the evidence.

3. That the verdict is contrary to evidence.

4. That the verdict is without evidence.

5. That the verdict is contrary to law and evidence.

6. That the verdict is contrary to the charge of the court.

The judge charged the jury that "if the evidence showed that the prisoner was under fourteen years of age, then the presumption of law is that he is innocent of committing crime, and it devolves on the prosecution to show that he had sufficient knowledge to know that it was a crime, and that he was guilty of committing the same." whilst the testimony failed to show such facts.

The motion was refused on all the grounds, except the last.

There are six grounds upon which the new trial was granted, they may be considered and disposed of under three general heads, and are whether the evidence is sufficient to show that he committed the homicide, and if so, whether he was legally responsible for the act?

The deceased was a girl of nine years of age, she was taken from her home on Sunday night, her absence gave rise to inquiry until her failure to return on Monday morning. A search was made for her, and near the spring from which the deceased and prisoner's families used water, her body was found and she evidently murdered.

The evidence shows that the prisoner and the deceased



were left at home together when the last of the family went to church on Sunday morning; that the deceased had told her father that prisoner had ridden his ox through his cotton and knocked it out; the father had warned him before he left for church on Sunday morning that he must not do that again. On Monday morning he denied the killing to two different persons without being charged with it, and he was not with the searchers after the missing child.

B. F. Jones, one of the witnesses on the trial testified as follows: "I with others had been to the place where the child was killed. Everett Rhodes who had also been with us, was on his way to pick cotton; I told him that I knew Wilson was around there, and would go to him when we parted company; sometime after that Everett came to my house and said that Wilson was hid behind a little cotton patch near my house and behind a log. I went in that direction and as I jumped the fence, I looked down the lane and saw him; as soon as he saw me in about sixty yards he started to run, when Everett grabbed him and held him until I captured him; it was between 9 and 10 o'clock in the morning. The first words he spoke were: "Mr. Jones, I never killed that girl." I replied, "I never said you did." He said, "Mr. Jones turn me loose." I said "I can't, we will go and see what Mr. Kitchens says about it." He then said "now Mr. Jones I will tell you the truth, I did kill her." I asked him how? He said "I killed her with a fence-rail." I asked him why he did it, and he said, "because she told a lie on me the day before—Saturday, big Bud (meaning deceased's father) and sister went to meeting, and left me there to water the steer, and when they came back she told her father that I rode the steer through the field. And on Sunday she followed me down to the spring, and I got some switches and whipped her for it. She ran up the hill to a haw-tree and cursed me. I went up there and got a switch and whipped her again, and when I started off she cursed me

I went to the fence, got a rail, went back and put it in the head three times and she died."

The witness, in answer to the question, "Did you find any thing near the body that corroborated what he had said?"

"I saw peach-tree switches lying close to the body and also a fence rail, with a piece broken off the end of it, which he told us were there." Other witnesses testified to the same facts, and also to there being the stubs of the switches at the spring.

The statement, which he made to the witness, was made also at the inquest to all present, and repeated to Mr. Bell, the jailor, several times; and in connection therewith, said that *he whipped* her for telling lies, and *killed* her because she cursed him. These statements were not wanting in naturalness, consistency, or variation; besides, they were freely and voluntarily made. The testimony shows motive, shows the prisoner crazed and worn, shows the rail with blood on it, the skull fractured by the blows dealt as described, the dead body with the merciless stripes inflicted. The confession of the prisoner, so thoroughly supported by corroborating circumstances, in our judgment fully justified the jury in finding that he slew the deceased. The State, so, but takes the case out of that referred to in 1876, where there was nothing but the bare confession and no evidence whatever of the *corpus delicti*.

The second question in this case is as to the prisoner's responsibility for the commission of the act.

The exact age was not shown by any of the witnesses, but Jackson testified that he had the mother for about eleven years before, and that the prisoner was living about, and was known as the Strickland boy. Dr. Ambler said that he knew the prisoner's mother for fourteen years before that time, and she had three children, one of whom was known as the Strickland boy. E. H. Hill testified that he was the oldest of his family of two boys, and was always called the Strickland

boy. So that he was certainly thirteen, and possibly fourteen years of age, but under the law the prisoner is always entitled to the benefit of any reasonable doubt, and it is never to be denied him. Admitting that he is under the age of fourteen years, he is only to be made amenable to the law where he knows the distinction between good and evil. Upon this point how stands the proof?

Daniel Hill testifies that he had as good a mind as most any boy, and that he compared in intellect very well with other boys between thirteen and fourteen years of age. Daniel Jackson: that he had a good mind, knew right from wrong, was hard-headed, and wanted his own way. Mary Moore swears that he has sense in some things, and in some he don't; he has a bad mind, he's not a good boy, he is mischievous, a bad boy to fight; I don't mean that he knows no better; of course he knows better.

Charles Barton testifies that he has known him fourteen or fifteen months; he has a good mind in regard to knowing good from evil. G. F. Bell says that he has known him since the 9th or 10th of September last (before the trial), has seen him two or three times a day, conversed with him often, and thinks his intelligence very good. B. F. Jones says that prisoner is a sensible boy; he knows what is right and what is wrong, and thinks that he does know good from evil. B. Kitchens has known the prisoner for three years, and he has as much sense as any other boy of his color. It is further shown by other witnesses that he is vicious, has a bad disposition, has fusses with little children, has had to be punished therefor, all of which indicate the temper and character of the prisoner.

Not a single witness was brought to testify in rebuttal. The jury had the prisoner and the evidence before them, and upon their oaths they said that he did the killing; that he knew good from evil, and that he was guilty of murder; the judge, upon reviewing the whole case, upon a motion for a new trial, refused to grant it, and therefore the verdict must stand.

been repeatedly ruled by this court that it is the province of jurors to pass upon all questions of fact, and that they are better judges thereof than this court possibly be, and unless there be some legal reason to take cases out of that general rule, they will not be so ruled. Judgment affirmed.

# GURLEY vs. THE STATE OF GEORGIA.

The court has no power to grant a license to retail liquor for a less term than one year, and a license for four months will not protect the retailer from prosecution.

Appeal allowed. License. Before Judge LESTER. Lump-sum fine. Superior Court. September Term, 1879.

Appeal allowed in the decision.

BOYD; M. G. BOYD, by brief, for plaintiff in error.

F. GREER, solicitor-general, for the state.

W. R. R. R., Chief Justice.

The defendant was indicted for the offense of mis-selling liquor, and charged with retailing spirituous liquors without a license. On the trial of the case the jury, under the direction of the court, found the defendant guilty. A writ of error was made for a new trial on the grounds therein specified, which was overruled, and the defendant excepted. It appears from the evidence in the record, that the defendant had obtained a license from the ordinary of the county on the 10th of January, 1879, to retail spirituous liquors for four months from that date, for which he paid \$8.33, and the only question insisted on here, was

whether that license would protect him against the charge contained in the indictment. The 530th section of the Code declares that all licenses to retail spirituous liquors are for the term of one year, and the fee prescribed therefor is \$25.00. The 1419th section declares that persons, before obtaining license to retail spirituous liquors, must apply to the ordinary of the county in which they desire to retail, who have power to grant or refuse such application, and also provides for giving bond, taking an oath, etc., and also declares that licenses granted in any other way are void. Construing these two sections of the Code together, as relating to the same subject matter, the ordinary had no authority to issue a license to retail spirituous liquors for any other term of time than that prescribed by law, to-wit., one year; and that being so, the four months' license, under which the defendant claimed protection, was issued without authority of law, and was void. The policy of the statute, in requiring licenses to retail spirituous liquors to be granted for one year, may have been to prevent itinerant liquor dealers from disturbing religious and other meetings, by procuring a license for a short time, so as to enable them to pursue their traffic during such meetings, and then leave that locality. But whatever may have been the object of the statute, we are content to maintain and enforce it as we find it. But it may be said that the defendant did not intend to violate the law, and did not know that he was doing so. The reply is that the seventh section of the Code declares that "Laws after promulgation are obligatory upon all inhabitants of this state, and ignorance of the law excuses no one."

Let the judgment of the court below be affirmed.

KIRK vs. THE STATE OF GEORGIA.

marriage between persons of color in December, 1865, was such is by no means apparent, yet, if they were living together as man and wife at the date of the act of 1866, the marriage was thereby established, and bigamy could be predicated

ment for bigamy need not state that the husband and wife were persons.

law. Bigamy. Persons of color. Husband and wife. Laws. Before Judge CRISP. Sumter Superior Court, October Term, 1879.

was indicted for bigamy and convicted. It appeared from the evidence that in December, 1865, he was living with Tiney Burke, and lived with her until about 1866, then married another woman. After conviction, the defendant moved for a new trial on the following grounds:

1. Because colored people could not contract marriage until after the act of 1866.

2. Because the indictment did not charge that defendant was colored, that being essential to the crime of bigamy.

3. Because the motion was overruled and defendant excepted.

4. Because the law was erroneous. *See* SIMMONS & MATHEWS; SIMMONS & SIMMONS, for error.

5. Because the defendant was not a solicitor-general, for the state.

6. Because of injustice.

7. Because the defendant was indicted for bigamy and found guilty, and made a motion for a new trial, which was overruled and he excepted.

8. Because there is no error of law discoverable from the record, and the case is fully made out. The defendant

The Western Union Telegraph Co. vs. The American Union Telegraph Co.

married one woman in 1865, and lived with her from that time till 1879, and then married another woman, the first wife still living. Even if the first marriage about Christmas, 1865, was illegal, which is not apparent, as defendant was then free and capable of contracting, he was living with that wife at the date of the act of 1866, which operated to make them married people, and his subsequent marriage, while the first wife was alive, made bigamy.

2. It makes no difference that the parties were colored ; at least their color need not appear in the indictment, and the conviction is right in every view we are able to take of the record. 12 Ga., 142; *Mitchell vs. The State*, last term.

Judgment affirmed.

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THE WESTERN UNION TELEGRAPH COMPANY vs. THE  
AMERICAN UNION TELEGRAPH COMPANY.

1. Contracts between railroad and telegraph companies, vesting in the latter the exclusive right to use or occupy the right of way of the former, for the erection of telegraph poles and other purposes in connection with their business of transmitting messages, etc., by telegraph, are void as in general restraint of trade, and tending to create monopolies, thus being against the public policy.
2. The railroad companies themselves are in possession of their rights of way by the exercise of the right of eminent domain, granted to them by the state for certain specified uses, and it was never contemplated that property thus condemned to the public use could be conveyed to another company for its exclusive interests and in antagonism to the public interest.
3. There was no power vested in the governor or superintendent of the Western and Atlantic Railroad, whilst conducted under state control, to convey any right of way along its line to any company by which such exclusive rights as are here claimed would pass. This result could only be accomplished by legislative act.

Constitutional law. Contracts. Eminent domain.  
Western and Atlantic Railroad. Before Judge SNEAD.  
Richmond Superior Court. April Term, 1880.

ed in the opinion.

MONTGOMERY, for plaintiff in error.

& CUMMING; J. L. BROWN, for defendant.

D, Justice.

American Union Telegraph Company filed its bill in the supreme and superior court to enjoin the Western Union Telegraph Company from interfering with it in erecting telegraph upon the several lines of railroad mentioned in the bill, and also to prevent said Western Union Telegraph Company from setting up certain contracts which it claimed to have with those railroads to the exclusion of the American Union Telegraph Company.

At the hearing below, the chancellor refused to grant the injunction prayed for, on the ground that the Western Union Telegraph Company had done nothing, and had made no threats to do so, and that it had no right to interfere with the American Union Telegraph Company in its lines.

The Western Union Company made answer in the affirmative to the bill of the American Union Telegraph Company, and to its cross-bill annexed copies of the contracts it claimed to have with the various railroads and companies named in the bill, and it claimed that said contracts were valid and could not be interfered with, and that the American Union Telegraph Company had exclusive telegraph facilities upon the rights of the several companies, and it prayed that the American Union Telegraph Company be enjoined from proceeding to set up such lines upon such rights of way.

The chancellor refused to grant such injunction upon the ground that the contracts so set up in such cross-bill and the exhibits thereto are void and of no effect as against the American Union Telegraph Company in so far as they purport to set up exclusive rights against it. To this the Western Union Telegraph Company excepted, and that exception they are at issue here.



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The Western Union Telegraph Co. *vs.* The American Union Telegraph Co.

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The single question made therefore by this record is: Are the contracts between the Western Union Telegraph Company and the railroad companies in so far as they grant the *exclusive* right to that company of establishing lines of telegraphic communication along their roadways, valid or void? The defendant in error insists that they are void:

1st. Because they contravene the act of congress of July 24th, 1866.

2d. Because in general restraint of trade.

3d. They are *ultra vires*.

4th. The right of eminent domain would be lost to the state if such contracts can be maintained.

Whether the act of congress passed in 1866 can affect these contracts executed anterior to its passage is immaterial to this issue, under the view which we have taken of it.

1. The second ground upon which the defense relies is, that these contracts are in general restraint of trade, and seek to create monopolies, and therefore against the public policy.

It is well known that rapid inter-communication between different points by wire and rail has created a wonderful revolution in commercial operations. Producers, consumers, manufacturers, merchants, buyers, sellers, all are brought in close proximity, and daily intelligence is given of the world's transactions. Trade is encouraged, industrial enterprise stimulated, and business in all its various branches builds itself upon knowledge. In war the rapid communication of intelligence is almost incalculable; in peace, it is scarcely less so. Shall the means, then, by which it is transmitted, be monopolized by a *contract* between two artificial beings, invisible, intangible, and existing only in contemplation of law? When such exclusive rights exist, or such monopolies are established, the same should be done by a legislative grant, and not by an individual contract. Our judgment therefore is, that these contracts are especially made and entered into to cripple

ern Union Telegraph Co. *vs.* The American Union Telegraph Co.

ent competition, and that they thereby enable the  
n error to fix its tariff of rates at a maximum,  
alone by the necessities of its patrons. Such  
are not favored by the law; they are against  
policy, because they tend to create monopolies.  
a general restraint of trade. Code, §2750; 40  
Oregon Navigation Company *vs.* Winsor, 20  
66, 68; Western Union Telegraph Company  
tic & Pacific Telegraph Co., 5 Nevada, 103,  
Union Telegraph Company *vs.* Central Union  
Company, U. S. C. C., Western District Mis-

ve have said on the second ground is sufficient  
that our opinion upon the third is that such con-  
*ultra vires.*

fourth ground is, that if the right to exercise  
er is admitted to be in the railroad companies,  
e by contract transferred to this company, then  
s right of eminent domain is gone. This appears  
be so clear a statement of the inevitable con-  
of such a construction that it is unanswerable.  
ise of the power of eminent domain, granted to  
companies for certain specified uses, for the bene-  
general public, was never for a moment con-  
o imply the right on their part by contract to  
is property, thus condemned to the public use,  
er company for its *exclusive interests*, and in  
m to the *public interest*. Their right to make  
with the Western Union Telegraph Company  
h its line of wire upon their right-of way is un-  
but when they go beyond that, and undertake  
it and exclude all other lines therefrom, then  
to add an unlimited franchise to one which is  
ed, and this they are powerless to do.

ate's right of eminent domain extends over  
t of its territory, and the same is held by its  
subordination to that fixed and co-existing right,

and may be taken for public uses upon just compensation.

It is to be remembered that this controversy does not arise upon any effort to displace the lines of wire established by the Western Union Telegraph Company, nor in any way to interfere with the free use and enjoyment thereof, but arises upon an interference, as is claimed, with its *exclusive* right to occupy the entire right-of-way of each of these companies. So that the question of compensation cannot arise, unless, indeed, it is to be given for a right supposed to exist under an illegal contract; that is, that no other telegraph company, except by its consent, shall ever use or occupy any part of the right-of-way of these several railroad companies. This being so, the act of 1873 does not impair the obligation of any contract made by the plaintiff in error with these companies, although it does provide the mode by which an unused and unoccupied portion of their roadways may be condemned.

4. It is, however, urged that the contract made with the Western and Atlantic Railroad is to be maintained, because made whilst under state control. We know of no power vested in the governor or superintendent of that road, authorizing them to convey any right-of-way along its line to any company by which such *exclusive* rights as are here claimed could be maintained. To authorize the grant of such *exclusive* rights, either for a term of years or in perpetuity, would, as we have already said, require more than executive consent; it must come by legislative act.

The law of the case, in our opinion, is as ruled by the chancellor, and his judgment is affirmed.

Judgment affirmed.

## LONGWORTHY vs. FEATHERSTON.

1. An entry on a *fi. fa.* in these words : "I have levied this *fi. fa.* on the house and lot formerly owned by J. D. Waddell, and now occupied by Henry May (and other property similarly identified), all situate in Cedartown, in Polk county, as the property of Charles W. Longworthy, non-resident, the same having been originally attached," contains a sufficient description of the property, and the *fi. fa.*, with such an entry on it, will not be rejected from evidence because of uncertainty of description.
2. The court-house of Polk county was burned; no other had been built, and no place permanently rented for court purposes. By special arrangement, court was held twice a year in a school-house, but at other times it was used for private purposes. The clerk's office was in a rented room at another place. On sale day the sheriff went to the site of the burnt court-house, and (the sun being hot) adjourned the sale to a grove near by and in full view. The sale was well attended, and the property brought full price :  
*Held*, that the sale was not void, and one who paid full price, and whose money was applied to the execution against defendant in *fi. fa.*, obtained a good title.

Levy and sale. Evidence. Sheriff. Title. County matters. Before Judge SIMMONS. Polk Superior Court. August Term, 1879.

Longworthy brought ejectment against Featherston. The jury found for defendant, and plaintiff excepted. For the other facts see the decision.

W. F. TURNER; I. F. THOMPSON; BROYLES & JONES, for plaintiff in error.

WRIGHT & FEATHERSTON; BLANCE & KING, for defendant.

JACKSON, Justice.

A tract of land belonging to Longworthy was sold by the sheriff to pay his debts, under levy of executions against him, and Featherston became the purchaser, and

was put in possession thereof. Some years thereafter, Longworthy sued for the recovery thereof from Featherston, on the ground that the sheriff's sale was illegal. Two points are made in the record and insisted upon here: One that the levy described the land insufficiently, and the other, that the sale was not before the court-house door.

1. The levy is in these words:

"I have levied this *fi. fa.* on the house and lot formerly owned by J. D. Waddell, and now occupied by Henry May, on the office formerly owned by Chisolm & Waddell, now occupied by Liddel & Chisolm, and on the house and lot formerly owned by V. B. Burton, and now occupied by W. W. Garrett, all situated in Cedartown, in Polk county, as the property of Charles W. Longworthy, non-resident, the same having been originally attached."

Objection was made to the introduction of the *fi. fa.* with this levy thereon, because it did not sufficiently describe the property, but the court admitted the *fi. fa.* We think that the levy was sufficient to authorize the execution to be admitted in evidence. A house and lot in a town wherein a certain man then (at the date of the levy) resides, is a description by which the property can be identified, particularly when aided by its having been attached, and known as the former property of another citizen. See 12 *Ga.*, 440; 53 *Ga.*, 191; 59 *Ga.*, 711. *Herman on Executions*, 381-2; *Freeman on Ex.*, 281.

The words "as the property" mean that the entire estate is levied on, and the interest of defendant is sufficiently set out in the levy.

2. The court-house was burned down. No new one had been built, and no place rented for a court-house. The superior court was held twice a year at an academy, but school was kept there, and the county only engaged it temporarily *at the time* and for the time the superior court sat, and it remained and was private property. The clerk's office was in a rented room at another place. Where the other county officers kept theirs the record does not tell us.

Under these circumstances the sheriff went to the site of the burnt court-house and the weather being hot he proclaimed and took the crowd to a shade some one or hundred and fifty yards off in full view of the site, and there sold the property to the highest bidder, at a fair and full price. The sale was completed and it appears that the property brought \$1000; and under the peculiar facts and circumstances of the case, we think that the purchaser who paid full money, and whose money, paid for this land, was applied to the satisfaction of the creditors of the plaintiff, should be protected. The court-house here was burnt, no other had been built, and no other had been rented by the year, or for any term of years, and no court-house—the academy had not been so built, but was merely used by arrangement with the academy twice a year to hold the superior court there, the balance of the time he kept school therein, and on the day of this sale the school was kept there. There was no court-house in the county at the time of the sheriff's sales therefore cease, and no title pass by the sheriff's sale, and no judgment be enforced, and the wheels of justice stop running? We think not. The sheriff ought not to have been at the academy; the academy and bidders would have been trespassers on the land of the school master and his private property. It ought not to have been at the clerk's office; that was in the academy building, and in no sense the court-house, for it does not appear that any court ever was held there; the academy shows no other place where to sell but the court-house, still the county property and whereon in time the court-house would be rebuilt; for convenience and the shelter of shade, and with no hurt to anybody, the sheriff proclaimed to the crowd assembled there within the limits of sale that he would go over to a grove in full view of the site and there everybody went and the sale took place. Under these circumstances take this case without the cases cited in the brief of counsel for plaintiff in error, who argued the case

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Hathorn *et al.* vs. Maynard.

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with much learning and ability, and we affirm the judgment upholding the validity of the sale.

The sale by the sheriff should be at the court-house, if there be one, either owned or rented by the county authorities: but if there be but the ashes of one, and none other substituted, the sheriff may sell there, or in full view of it, after proclaiming within the hours of sale to the assembled bidders that they would go to a shady place hard by to escape the oppressive heat of the sun; and one who buys for full value at such a sale will be protected by the sheriff's title against the defendant in execution.

Judgment affirmed.

HATHORN *et al.* vs. MAYNARD.

1. The vendee of property, the absolute title to which was apparently in the vendor, to protect it from a trust sought to be set up, is only bound to show that he had no notice of the trust funds having gone into the property, although he might have had some knowledge of the mingling by his vendor of the trust funds with his own. The *onus* of pointing out and identifying the trust property was not on him, if he could show that he was an innocent purchaser.
2. Where a deed by its terms conveys in trust only four-sevenths of the land to one party, and three-sevenths to another not in trust, but unconditionally, to instruct the jury that they might find that it all was trust property notwithstanding the recitals in the deed, would be error.
3. Where the court was requested to charge that "even if the vendor gave the vendee assurances that no trust money had gone into the property, the vendee acted on this assurance at his peril, and if it turned out to be untrue he is not protected," it was not error to add, "unless in your judgment he acted upon such information as became a prudent man in making inquiry after truth."
4. To the request that "a *cestui que trust* is not bound by statements made by a trustee to enable him to violate his trust," it was proper to add, "if you are satisfied in this case such statements were made with such a purpose."
5. In view of the facts it was not error to charge that "if husband and wife took a deed jointly to certain property, he three-sevenths

and she four-sevenths, they were tenants in common; and if the husband, in paying for his interest in property afterwards purchased, used a portion of his wife's profits derived from the sale of the place, this, without more, did not destroy their joint interest in the property bought with the proceeds of such a sale, but it made the husband the debtor of the wife to the extent of her money so used, which could be settled between them at any time," the important fact being whether he had or had not so settled the liability.

6. A request to charge, which required a full settlement on the part of the trustee with the *cestui que trust* before property which had been mixed with the trust estate could be conveyed at all, one of the questions made being whether a part or all of the trust estate had been fully accounted for so as to leave the property in dispute wholly or partially free from the trust, and which further required the purchaser to prove that the other property, with which he had no concern, was sufficient to settle with the *cestui que trust*, was properly refused. To have made it applicable at all, it needed a qualification to the effect that the purchaser must have known at the time that the funds had been mixed.
7. There was no error in charging that if complainants had been fully paid by the conveyance to them of property equal to the value of the original amount received, they could not recover.
8. There was no error in charging that if the trustee mingled his own with the trust funds, yet he had the right to settle with his *cestui que trusts* by conveying to them an amount of property equal in value to the *corpus* of their estate and the profits thereon, and that if they are now in the possession of such property, claiming and enjoying the same, it is evidence of their acceptance of such settlement. In view of the testimony, the court should have added that at the time of the conveyance and settlement some change was necessary to indicate the transfer and acceptance besides the mere paper title.
9. A deed is the best evidence of the intention of the grantor in making it, and must be produced, if accessible; parol evidence on the subject should be excluded.
10. The verdict is contrary neither to equity, justice, nor the charge of the court. It is supported both by the law and the evidence.
11. Where the bill of exceptions was filed in the clerk's office in time for it and the record to be forwarded to the clerk's office of the supreme court before the return day for the next term, but it was not sent up until such term had commenced, the clerk in his certificate giving as the cause of the delay that plaintiffs in error had failed to pay the costs, and had not filed their affidavit in *forma pauperis* until three days before the papers were in fact forwarded:



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Hathorn *et al.* vs Maynard.

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*Held*, that on the call of the case at the heel of the docket of the entire term, under the act of 1877, the writ of error will not be dismissed because of the delay. The reason thereof, as stated in the clerk's certificate, will be considered, and as it was the failure of plaintiffs in error to pay the costs, which was no legal excuse to the clerk for the delay, it was not caused by the "consent, direction, or procurement of any kind" of plaintiffs in error.

Trust. Deed. Charge of Court. Vendor and purchaser. Husband and wife. Compromise and settlement. Evidence. New trial. Practice in the Supreme Court. Before Judge LAWSON. Monroe Superior Court. August Term, 1879.

This case was called at the heel of the docket of the entire term, under the act of 1877. A motion was made to dismiss the writ of error because of the delay in the transmission of the case from the clerk's office of the superior court, it being claimed that the certificate of the clerk to the bill of exceptions brought it within the proviso to the first section of the act of 1877, that is, showed that the delay resulted from the act of plaintiffs in error. The facts were as follows:

The bill of exceptions was filed in the clerk's office of the superior court on December 15th, 1879, in abundant time for the papers to have been forwarded before the return day to the next February term of this court. They were not forwarded until March 17th, 1880, reaching this court, then in session, on the same day. In his certificate the clerk gave as the cause of the delay, that plaintiffs in error filed their affidavits in *forma pauperis* on March 16th, 1880, and that they failed to pay the costs as required by law.

It was replied to the motion, first, that as the cause of the delay was not germane to the clerk's certificate, it could not be considered as therein stated. Secondly, that if the facts set forth in said certificate be considered, they furnished no excuse to the clerk for the delay, as it was

to forward the papers within the time prescribed whether the costs were paid or not. Thirdly, that to file affidavits in *forma pauperis* at an earlier time would not make a case where plaintiffs in error, by their own or that of their counsel, had been the cause of the error. Fourthly, that the error was not caused "by consent, direction, or procurement of any person," as to bring it within the proviso to the first section of the act of 1877.

tion was overruled, the court enunciating the stated in the last head-note.

s, so far as material to the questions decided,  
in the opinion.

& ANDERSON; W. D. STONE, for plaintiffs

& TURNER; STEWART & HALL; Z. D. HAR-  
defendant.

O, Justice.

Hathorn sold and conveyed to John B. Maynard of land known as the Greer place. His sons, Nathaniel and N. J. Hathorn, filed their bill in equity against him and John B. Maynard, in which they alleged that he was a trustee for their mother, Narcissa L. Hathorn, and that the property sold was theirs in fee simple. The said Maynard, who had bought it, knew that it was trust property, although the title was in his name. The prayer of the bill was that the defendant, Maynard, be removed from his trust, and that the sale be canceled. The defendant, Maynard, by his answer denied the material allegations affecting him, and moved for judgment under the evidence and the charge of the jury found in his favor; whereupon the court granted a new trial on several grounds of error committed by the judge and upon the said trial. On the hearing of the mo-

tion for a new trial, the same was overruled by the court, and the complainants excepted.

1. Grounds 1, 2, 3, 4, 5, 6, 7, arise upon the testimony under the instructions of the court applicable thereto, and of which the jury considered, and by its finding negatived the facts asserted that they found either contrary to law or to the charge of the court. A doubt might possibly arise under the sixth ground, as to whether they did not find contrary to the charge wherein the judge instructs them, that if Maynard did not have notice of the presence of the trust in the Greer land, and yet had notice of the mingling by Hathorn of his own estate with that of the trust so that he could not identify them, then the burden would be on him to show that the trust funds did not go into the Greer place, and that it devolved upon him to point out and identify the trust property if he would save his own.

We think that the judge put, in this particular charge, the burden too heavily upon Maynard, in requiring him to show anything more than that he had no notice of the trust funds having gone into the Greer place, even though he might have known something of the mixing of the funds. The further duty of pointing out and identifying the trust property was no part of his duty, if he could show that he was an innocent purchaser, and that none other was involved in the litigation. If none of the trust property were in existence, yet if Maynard bought this in good faith and it was free from the trust, his title was perfect, without being called on to point and identify what might or might not be found.

2. The refusal of the court to charge as requested in the eighth ground was not error. Where a deed, by its very terms, conveys in trust only four sevenths of the land to one party and three-sevenths to another—not in trust, but unconditionally—it would be error to instruct the jury that they might find that it all was trust property, notwithstanding the recitals in the deed. The highest evidence of what the intention was would be what it said.

3. The ninth ground of error was the refusal of the court to give in charge the following request without modification: "Even if Hathorn gave Maynard assurances that no trust money had gone into the Greer place, Maynard acted on this assurance at his peril, and if it turned out to be untrue he is not protected. *A cestui que trust* is not bound by statements made by a trustee to enable him to violate his trust." The first part of this charge was modified by adding that "unless, in your judgment, he acted upon such information as became a prudent man in making inquiry after the truth." To the last part he added the words: "If you are satisfied in this case such statements were made with such a purpose."

To determine whether there was error in these modifications, it is necessary to look at the issue and the testimony. Among the first were, whether the trust fund went into the land at all, and if it did, had Maynard notice of that fact? The objection to the qualification is, that it did not require Maynard to go further and inquire as to the matter before acting—that he should have sought information other than that given him by Hathorn.

According to the evidence, Hathorn had managed and controlled this estate himself from 1858 to the time of the trial; any knowledge, therefore, in possession of another must have come from him. The interest of Hathorn in the object sought by both himself and Maynard, made it necessary for him to speak the truth. At last it was but a mere question of the diligence of one in search of truth, and as Hathorn had no motive tempting him to deceive Maynard, the necessity for further inquiry, the jury doubtless thought, did not exist.

4. The second qualification was a proper one, because the charge *assumed* that the statements made by Hathorn were made to enable him to violate his trust, and therefore to add, "if they were made for such a purpose," then that would make the charge right.

5. The tenth ground was not insisted upon. The eleventh

was the giving in charge the following request: "If Hathorn and wife took a deed jointly to the Barron place, he three-sevenths and she four-sevenths, they were tenants in common; and if Hathorn in paying for his interest used a portion of his wife's profits, derived from the sale of the place, this, without more, did not destroy their joint interest in the property afterwards purchased with the proceeds of such a sale, but it made Hathorn the debtor of his wife to the extent of her money so used, which could be settled between them at any time."

Taking the case made by the testimony and this charge, we gather its meaning to be that if these parties were co-tenants in the land, and if Hathorn used this money so received from a sale of the joint property of himself and his co-tenant, that that act without more would not destroy their joint interest in property afterwards purchased with the proceeds of such sale, and if he did thus use that money he might settle the debt either then or subsequently. The main and important fact being whether he had or had not so settled the liability.

6. The twelfth ground of error was, because the court refused the following request:

"If Hathorn had mixed his own and the trust funds, so that he could not identify what belonged to the trust estate, he could not convey property to his *cestui que trust* which she did not agree to take in full settlement with her and thus discharge his liability to the trust estate. At all events, it is incumbent on him, or Maynard claiming under him, to show clearly and satisfactorily that the property he conveyed to his *cestui que trust* was fully sufficient to cover his indebtedness to the trust estate. The burden of proof is on the trustee or Maynard to prove this to the entire satisfaction of the jury."

This charge as asked, in the first part of it, limits any conveyance which Hathorn might make to a full settlement, before the property which had been mixed could be separated and conveyed at all, whereas one of the very

was made was, whether a part or all of the trust had been fully accounted for so as to leave the estate wholly or partially free from the trust. In the part of it, it was objectionable because it required to prove that the other property, and with which no concern was sufficient to settle with the *cestui que*. To have made it applicable and unobjectionable, and a qualification to the effect that Maynard must own at the time that the funds had been mixed. The thirteenth, in substance, sets out that under the deed of trust, Hathorn had the right to use the issues and profits in the support, maintenance and education of his *cestui que trusts*, and although the property have been mixed with his own, yet if he has fully paid and settled with them by conveying to them an amount of property equal to that of the trust funds originally received, and with their share of the profits, then they cannot

in effect, is but instructing the jury that if the tenants had been *fully* paid by the conveyance to them of property equal to the value of the original property received, that then they could not recover any more, and this certainly was the law.

This was not warranted by the testimony and should have been refused.

The fifteenth ground was because the court charged the jury in substance: That if Hathorn mingled his own with the trust funds, yet he had the right to settle with his *cestui que trusts* by conveying to them an amount of property equal in value to the *corpus* of their estate and the profits and if they are now in possession of such property and enjoying the same, it is evidence of acceptance of, and satisfaction at, such settlement.

The only new phase in which this charge puts the law before the jury is, that the possession of property, together with the claim of right and enjoyment, is evidence of the ratification and ratification of the manner in which the

same was acquired. We concur with the judge in the principle that it is evidence for the consideration of the jury, but in view of the other testimony we think that he should have coupled it with the further charge, that at the time of the conveyance and settlement, some change was necessary to indicate the transfer and acceptance besides the mere paper title.

9. The seventeenth: Because the court required the complainants to introduce the original deed of trust after it had been made to appear that the same was in writing, or he would rule out all the evidence about the sale of the Barron place. The question at issue as to that place was, what proportion of it was conveyed in trust? Hathorn insisted and testified that he intended it all to be so conveyed. The deed itself, of course, was the highest and best evidence of intention and act, and was properly ruled in by the court, otherwise the parol testimony should have been ruled out.

10. The eighteenth and last ground is that the verdict is against equity and justice and the charge of the court. We do not consider this ground well taken. This suit was brought by the sons against the father and uncle, and joined in by the wife against the husband and brother, to set up a trust that appears to have been abandoned for many years, and was resurrected to defeat the recovery by Maynard of the Greer place, who not only had paid honest money for it, but by his timely aid saved for his sister and her children, two of whom are the complainants, much of what remains to them. A different verdict would be against equity and justice if Maynard, Hanson and Mrs. White are to be believed, and the jury, it seems, did believe them, for they testify that the money borrowed from them went to pay for the Greer place, as Hathorn himself stated to them, so that it never was any part of the trust estate.

Whilst, therefore, some errors may have been committed in giving the requests to charge, and some in the refusals

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Washington vs. Cartwright.

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as requested, yet the *general charge* submitted of the case properly to the jury, and their verdict abundantly supported by the proof, the judgment is affirmed.

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WASHINGTON vs. CARTWRIGHT.

The seller of a horse was indebted to the plaintiff for land, and in payment of the parties the purchaser of the horse gave his note to the plaintiff, who credited his debtor on the land with the amount of the consideration of such note, in the hands of the plaintiff, not the purchase money of the horse, so as to render it subject to judgment thereon, notwithstanding it had been set apart as exempt under §2040 *et seq* of the Code. The extinguishment of the debt for the land was the consideration of the note.

Instead. Contracts. Debtor and creditor. Before  
BUCHANAN. Carroll Superior Court. October  
1879.

reported in the opinion.

SE & ADAMSON, by brief, for plaintiff in error.

B & COLE, by C. W. MABRY, for defendant.

ON, Justice.

The case came before the superior court on a *certiorari* from the justice of the peace for one of the districts of Carroll County, whereupon the superior court sustained the *certiorari* and remanded the case for a new trial in the justice of the peace and the plaintiff in error excepted. The answer of the justice of the peace adopts the petition as true, and the same is made in the record: A horse was levied on as property of Cartwright under a *fi. fa.* in favor of Washington; the horse had been set apart as exempt



from levy and sale under §2040 *et seq.* of our Code; the plaintiff said the horse was liable, because the judgment was for purchase money; the defendant made a counter-affidavit, and this made the issue between the parties. The facts were that Cartwright traded for the horse from one McCalman; McCalman owed Washington for land; Cartwright was to give the amount of the note on which this judgment was founded, as boot to McCalman in the exchange of horses; before he gave his note for the amount, it was agreed that he should give the note to Washington, and that Washington would release McCalman from the payment of that sum on the land, and thereupon the note was given and made payable to Washington, and renewed, and suit brought on the renewed note, and judgment and execution were based thereon, and this levy was made on the horse, and issue joined on the question whether the consideration of the note was purchase money for the horse, or the extinguishment of McCalman's indebtedness for the land to the extent of the amount of the note. The court ruled that the consideration thereof, was not the purchase money for the horse, but the payment of McCalman's debt to Washington. We think that the court ruled correctly. The question is controlled by the cases reported in 40 *Ga.*, 423 and 487, and 60 *Ga.*, 456. In the last named report, it was held that "the substitution of debtor for debtor, was not infrequent," and in such case "that the undertaking was not collateral but original, and performance may be enforced between the new parties, no matter what equities between the primary contractors may have existed." It is wholly immaterial to the contract between Washington and Cartwright, what equities existed between Cartwright and McCalman, or what consideration moved Cartwright to acknowledge himself to have been McCalman's debtor. By this new contract he became, by substitution, Washington's debtor, and was bound to pay Washington, because Washington had released McCalman to the amount of the note; or,

words, the extinguishment of McCalman's debt to Washington was the consideration of Cartwright's debt to Washington. The horse had nothing to do with the debt. If it had been a gaming debt that he owed to Washington, as was the case in *60 Ga., supra*, or the consideration of that debt had been anything else than the extinguishment of the obligation to pay Washington would have been the consideration. Its consideration was the agreement by Cartwright to extinguish McCalman's indebtedness to Washington by the agreement by McCalman to extinguish Cartwright's indebtedness to him. Thereupon, the horse debt was extinguished and the land debt acknowledged. The consideration was Washington's. It was the land that he wanted, and it was for the land that Cartwright agreed to assign the debt which McCalman owed.

Therefore we are of the opinion that the court was correct to sustain the *certiorari*, and hold the horse to be bound from the payment of a debt owing for the land. The judgment is affirmed.

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ALLEN *et al.* vs. DAVIS.

Two deeds were made by the same grantor conveying the same property to different persons, and the question at issue in an action of ejectment, was which chain of title should prevail, the first or the second. The plaintiff is a competent witness, notwithstanding the death of the defendant, to show that the first deed was based upon no consideration, and was executed simply to avoid the land being made subject to the payment of his debts. Such testimony was certainly admissible in his own favor, and whilst he was the plaintiffs' lessor who executed the first deed, he was also the warrantor of the title to the land which the defendant held, and his interest was therefore properly balanced.

The verdict was in accordance with the law and the evidence.

Verdict. New trial. Before Judge ERWIN. Gwinnett County Court. September Term, 1879.

Reported in the opinion.

WINN & SIMMONS, for plaintiffs in error.

CLARK & PACE; N. L. HUTCHINS, for defendant.

CRAWFORD, Justice.

The plaintiffs in error brought suit to recover one-third interest in  $366\frac{1}{2}$  acres of land in the possession of Thomas J. Davis, the defendant in error, and supported their right to recover upon the following chain of title: Deed from Absalom R. Allen to Thomas V. Allen, dated September 1st, 1848; consideration, \$900.00. Deed from Thomas V. Allen to Jesse Love, trustee for Rebecca Allen, grantor's mother, for life, with remainder to himself, James Allen and Pressley M. Allen, dated July 14th, 1852; consideration, natural love and affection. Deed from James Allen to Mary Smith for one third interest in the same lands after the death of Rebecca Allen, dated January 12th, 1856; consideration, \$100.00. Deed from Mary Smith to James B. Allen and Mary A. Townley, the plaintiffs, to one third interest in the same lands after death of Rebecca Allen, dated May 6th, 1858; consideration, love and affection and \$100.00.

It was shown by the proof that all these parties occupied the land from 1837 until the defendant, Davis, went into possession; that Rebecca died in 1877; that James B. Allen and Mary A. Townley were the children of Thomas V. and Pressley M. Allen.

The defendant, Davis, submitted a deed from Rebecca Allen, Thomas V. Allen, as her trustee, James Allen, Pressley M. and Thomas V. Allen, dated March 4th, 1869; consideration, \$1,000.00; a sheriff's deed to one-third interest in this same land, levied upon and sold under a judgment dated September 16th, 1856, and *fi. fa.* upon it against James Allen in favor of Clark & Lamar, as the property of the said James Allen, the said sale taking

4th, 1869. The depositions of James Allen admitted over plaintiffs' objections, and in testified that his deed to Mary Smith was with- eration, and made to prevent Clark from selling t in the land; that there was an understanding is two brothers and himself that it should be to the plaintiffs, who were their children, to m being sold to pay his debts; that this deed l over to defendant, Davis, when he bought the was in his possession when he saw it last. He making the deed with his mother and brothers

mitted by counsel that the debt of Clark was g one when James Allen made the deed to Mary l testimony submitted that Allen was a poor ad no visible property.

y, under this evidence and the charge of the rned a verdict for the defendant. The plaintiffs a motion for a new trial—

use the court erred in allowing the depositions Allen to be read and considered, to affect the Mary Smith, she having died, and each being the plaintiffs with opposing interests.

use the verdict of the jury was contrary to law ry to evidence.

rt refused the motion, and the plaintiffs ex-

the testimony of James Allen, under the evi- of 1866, inadmissible? Had *he* been seeking this land conveyed by him to Mary Smith back state, or from those to whom she had conveyed d not have been a witness in his own favor be- er death, but in this case he was called by the *erty* to testify, and was not admitted by the court *n his own favor*. His deed to Mary Smith had ed in evidence; it purported to have been in on of \$100.00, and it was offered by the plain-

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Howard, ordinary, *vs.* Gray, administrator.

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tiffs, when he was called by the other party in rebuttal, and in no view to testify in his own behalf. He had made deeds to Mary Smith and to the defendant, Davis; he was, therefore, a competent witness *except in his own favor*. He had no opposing interests about which he was incompetent to testify, as he was introduced. Whilst he was one of the lessors of the plaintiffs, he was also a warrantor of Davis' title, and his interest was, therefore, equally balanced between them, and he did not appear as a witness to take any beneficial interest in the event of the suit as against Mary Smith, or, indeed, any one else.

2. We think that under the law and the evidence as it appears in the record, that the jury made a proper verdict, and as there was no error of law on the part of the court, that the motion for a new trial was properly overruled.

Judgment affirmed.

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HOWARD, ordinary, *vs.* GRAY, administrator.

Questions not made in the court below will not be considered in the supreme court.

Practice in the Supreme Court. February Term, 1880.

At the July adjourned term, 1871, of Bartow superior court, the case of *Tumlin vs. Ordinary*, etc., was dismissed for non-payment of taxes. In 1876 a motion was made by Gray, administrator of Tumlin, the latter having died, to set aside the judgment of dismissal. It was opposed on the ground that the motion was barred by the statute of limitations, and that it was a judgment of a court of competent jurisdiction to which exception should have been taken at the time. The motion was granted, and the ordinary excepted. The bill of exceptions sets up that the ordinary was not the proper representative of the county in such

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Howard, ordinary, vs. Gray, administrator.

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but the commissioners were the proper parties. Cutchen, however, certifies that this point was before him.

SON, for plaintiff in error.

KIN, for defendant.

Justice.

y error insisted upon here in this cause is that to set aside the judgment which dismissed of Tumlin, plaintiff's intestate, against the Bartow, in 1871, for non-payment of taxes, be made until the county was represented in the commissioners of roads and revenues, under 1874, p. 331, which act transferred all such from the ordinary to those commissioners. The pending against the ordinary in 1871 when dismissed the motion to vacate that judgment was made after the act of 1874 was passed. And the point the plaintiff in error, is that the commissioners have been made parties in 1876, when the last motion was made, or before it was acted on. If the point had been made in the court below, perhaps the commissioners would have been made parties, and all difficulty would have been removed; but the point was not made there at the time it was argued, and therefore it is not to be reviewed here. The case is reinstated, and before the court proceeded with to trial, the commissioners should be made parties, if necessary, and no harm will be done by the county. The judgment, for these reasons, is affirmed. Besides, it is difficult to see how the ordinary, who brought the case here by bill of exceptions, was not properly represented by him in the court below, where he filed an answer for the county on the merits, and how he comes to represent it here? The judgment is affirmed.

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Thornton, ordinary, *vs.* Willis, trustee,

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THORNTON, ordinary, *vs.* WILLIS, trustee.

1. A purchase by an executor at his own sale is not void, and although it may be set aside by any parties injuriously affected thereby, yet until that is done the legal title remains in the purchaser.
2. Where land was so purchased by an executor, his title being only voidable, the property was subject to an execution based on a judgment rendered against him whilst he held the title.
3. The jury having found contrary to the charge, a new trial should have been granted.

Administrators and executors. Judgment. Levy and sale. New trial. Before Judge LAWSON. Greene Superior Court. September Adjourned Term, 1879.

Reported in the opinion.

JOHN C. REED; M. W. LEWIS & SON; J. B. PARK;  
JOHN A. MCWHORTER, for plaintiff in error.

PHILLIP B. ROBINSON, for defendant.

CRAWFORD, Justice.

An execution in favor of the plaintiff in error was levied upon 550 acres of land as the property of Lewis B. Willis, who came forward and as trustee for his wife and children, claimed the same as their trust property, under the ninth item of the will of R. J. Willis, deceased, the same being the legacy given and bequeathed to them by the said will in trust for their sole and separate use. Upon this claim as filed issue was joined, and a trial had, which resulted in a verdict finding the property not subject, where the plaintiff in *fi. fa.* moved for a new trial, which was refused and he excepted.

Among the grounds upon which a new trial was asked were: because the court charged the jury, that if the land was purchased by the defendant in *fi. fa.* at the executor's sale, and he still holds it under said purchase, such title

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Thornton, ordinary, *vs.* Willis, trustee.

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ly voidable, it would be subject to the execution ; charge being the law, and the jury having found it.

further, because the verdict is contrary to law ; y to evidence ; is without evidence ; and strongly cidedly against the weight of the evidence. An ation of the entire record brings us to the conclu- at a new trial should have been granted in this case, e the verdict of the jury was contrary to the charge court, as set out in the first ground above specified, as contrary to law, as stated in the second.

views which we have of the law governing the facts case, and as applied to the two grounds named, necessarily dispose of all the questions made in the for a new trial.

contested point upon the trial of this claim case no held the legal title to the land at the time when gment was rendered, and subsequent thereto up to e of the levy. The claimant assumed the burden, dertook to show that it was the trust property of *ui que trusts*, bequeathed to them by the ninth item will of his father, R. J. Willis, deceased. He sup- this title by the fourth item of the will, which direc- executors, he being one of them, to sell all of the both real and personal, and when the actual value ertained, to pay over one-sixth part to the testa- fe. By the ninth item, one-sixth part was to be given wife and children of the claimant, and he was con- d their trustee.

final return of the said executors was introduced, contained a voucher numbered ten, bearing date y 25th, 1871, signed by claimant as trustee and ledging the receipt from the executors of \$4,350.00, rributive share due him from the estate as trustee wife and children. The claimant then testified e land levied upon was sold by the executors De- 3d, 1867, and bought by them, to keep it from



being sacrificed; they did not pay the money for it. That the voucher No. 10, which had been introduced in the final returns, included his wife's interest in the real and personal property, and that it covered the land levied upon and claimed. The land was bid off at the executor's sale by W. L. Strain, at \$3,000.00, which was not paid, but the executors took the title from Strain and accounted for it at \$9,000.00 in the final settlement. The three purchasers from Strain held the land and worked it jointly for five or six years, and then divided it. That he had paid taxes since the partition on the land as his own; before that time it was given in as Heard and Willis'. The deeds from the executors to Strain, and from Strain to S. D. Heard, J. H. Willis and L. B. Willis were read, and the claimant closed.

The plaintiff in *fi. fa.* introduced the sworn answer of the claimant to a bill in equity, praying, among other things, that the purchase of this land be rescinded, pending in the same court, wherein for certain named reasons, he answered, that fearing that the land would not bring its value, the executors requested W. L. Strain to make it do so, and though being legatees and representatives of legatees and largely interested, they were not prohibited by law from buying at their own sale, and making the property bring its value, especially when the said Strain who purchased was the highest and best bidder. The return of the executors was then introduced, from which it appears that this land was sold December 3d, 1867, to Strain as highest bidder, for \$3,000.00 in currency, and return made August 12th, 1868. Two mortgage deeds introduced, made and executed by the claimant, in his own individual name, the first dated May the 2d, 1874, the second September the 8th, 1875, conveying one-third interest in 2284 acres of land, known as the Dover place, to secure his sureties against loss on this identical claim. Upon this latter mortgage, Mrs. Willis, the wife, one of the *cestui que trusts*, relinquishes all right to *homestead*, *dower*, and

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Thornton, ordinary, *vs.* Willis, trustee.

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rt in said land. The guardian's bond of the was then introduced which was the foundation *vs.*, and bearing date May the 4th, 1868.

s synopsis of the testimony, we see that on ay of December, 1867, the 550 acres of land upon, and forming originally part of the tract ne Dover plantation of Richard J. Willis, de- exposed to sale by the executors and bought L. Strain at \$3,000.00, to whom the executors *simple* deed. On the same day he makes and deed to the same land to S. D. Heard, J. H. L. B. Willis at the same price. These parties session and cultivate the land five or six years, n it as theirs, then divide it between themselves, claimant gives in and pays taxes upon that por- art to him as his own up to the time of the

appears from the testimony that on the twelfth ust, 1868, he made his return and showed the sale to Strain at the \$3,000.00, United States cur- at notwithstanding he says that his receipt for given January 25th, 1871, was for this land, and ttlement, it is not so written, but on the con- at much money. Besides, the land was culti- e purchasers for three years after this receipt, y this claimant was it mortgaged as his own, e, three years after this settlement, and the e, nearly five years thereafter; in both instances conveyance for one-third interest in 2284 acres atation known as Dover. So that the 550 acres ld not have passed to him in 1871 as claimed, ent to him at the time of the partition between H. Willis and himself.

certainly, had it been received as the legacy of der the voucher for the \$4,350.00, some allu- d have been made to that fact, some convey-

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Thornton, ordinary, vs. Willis, trustee.

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ance or relinquishment of title by S. D. Heard and J. H. Willis as well as himself, in whom the legal title had been from December 3d, 1867. He would hardly any longer have had it returned for taxes in the names of Heard and Willis, nor would it seem reasonable that after it was partitioned that he should have returned it as his individual property. If this land were received in January, 1871, as his wife and children's legacy, it makes his mortgages in 1874 and 1875 exceedingly inconsistent with that view, for in those papers he recognizes and conveys the one-third interest which he held under the deed of Wm. L. Strain. This is made the more inconsistent by the relinquishment by the wife of her right to *homestead, dower and year's support* in the *one third interest* of the Dover plantation.

It is to be noticed also that the item of the will invoked does not give property in kind to these *cestui que trusts*, but after directing the sale of all the property, real and personal, then one-sixth part is to be received by them. These facts grouped together stagger the belief, and levy too heavy a tax upon the understanding to make it yield to the conviction that this particular land passed to these claimants in the manner asserted.

A purchase made by executors at their own sale is not void, and although it may be set aside by any parties injuriously affected thereby, yet, until that is done, the legal title remains in the purchasers. Parties thus invested with title, can be divested only upon its being set aside in a legal way by a court of competent jurisdiction, or by conveyance from them as provided by law.

Here we have a sale, a deed made by the executors to Strain, the purchaser, and eight month's thereafter a return by them made of the sale, the name of the purchaser given, and the price paid, then a deed from this purchaser to the defendant in this *fi. fa.* and two others, and no conveyance from this defendant being shown, leaves in him, so far as appears, a title to one-third interest, which

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The National Bank of Augusta vs. Heard *et al.*

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at most is only voidable, and renders the land, under the charge of the court, subject to this execution. The verdict of the jury, therefore, being contrary to the charge of the court, is contrary to law, and must be set aside and a new trial granted.

Judgment reversed.

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THE NATIONAL BANK OF AUGUSTA vs. HEARD *et al.*

In respect to interest a decree has the same force as a judgment, when it contests with other liens or claims for money. But this refers to a decree in *personam*, binding all the property of the debtor, and rendered against the defendant, without reference to the sale of particular property and the distribution of the fund arising therefrom. Where a decree provided for the sale of certain property, and a division of the proceeds according to certain fixed priorities, naming amounts to be paid to claimants, and there was not enough to pay principal and interest of all the debts, the decree will not be construed as giving interest to one to the exclusion of others. If the property out of which the fund arose had been productive in the hands of a receiver, the net increase would be divided proportionately.

Decree. Interest. Before Judge SNEAD. Richmond Superior Court. October Term, 1879.

The sole question considered in this case, was whether a certain amount decreed to be due, and which, with other claims, was to be paid out of an estate, bore interest or not. The decree was based on the bill of *Mary E. Heard et al. vs. Osborne M. Stone et al.* The litigation arising out of this case was very complicated, involving the estate of I. T. Heard, against which various claims were advanced: debts resulting from fiduciary relations of deceased, from a marriage settlement, as a partner of I. T. Heard & Co., by mortgage, for taxes, etc., etc. On this Judge Pottle, who presided without a jury, rendered a decree fixing the amounts due various claimants, the *status*

and rank of each. This was February 1st, 1878. It contained the following:

"That the receivers appointed by the court do proceed to sell all of the property of which the testator died seized and possessed, except the lot on the corner of Greene and Elbert streets, which is described in the marriage settlement, to the highest bidder, at the earliest practicable period, for cash, in the respective states in which the property is situated, according to the forms of law governing public sales in each of said states. That the firm of Isaac T. Heard & Co. is entitled to the sum of three thousand and forty-two 08-100 dollars, paid June 13th, 1872, to perfect the title to the vacant lot on Greene street, and also the sum of two thousand two hundred and seventy-four 64-100 dollars, paid February 2nd, 1871, to perfect the title to the plantation in South Carolina."

The question arises over the claim for \$2,274.64 now owned by the bank. The receivers, in whose hands the property had been placed, sold the last piece in 1879—a plantation in Carolina. Out of the fund thus brought into court, the bank claimed to be paid its debt and interest, to the exclusion of other contestants over whom it had priority. This question came on for a hearing before Judge Snead. He delivered the following decision: "The question submitted is upon the construction of the decree rendered by the chancellor in this case, whether or not interest is to be allowed upon the sum of \$2,274.64 which was awarded to Isaac T. Heard & Co., and which is the property of the National Bank of Augusta. Not knowing anything of the case (which evidently was an intricate one), except what has been learned from the decree itself and the argument of counsel thereon, I confess some embarrassment in passing upon this question. It is apparent that this is not an ordinary judgment. It was for a sum certain, which, with other amounts, was to be paid or refunded out of the sale of certain species of property. This property and the proceeds were in the hands of a receiver of this court. No order for investment to accumulate interest was issued, nor does it appear that any interest was realized. The chancellor simply

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The National Bank of Augusta *vs.* Heard *et al.*

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s to Isaac T. Heard & Co., the sum of \$2,274.64, says nothing about interest. If he intended to interest he should have said so, and as he does not I am inclined to think that he did not intend that it should be allowed. Hence, the order is passed 274.64 without interest."

following decree was accordingly granted by him :

on the confirmation of the report of the receivers and directing it to be made pursuant to the decree of February 1st, 1878, question was raised as to the amount payable to the National Bank of Augusta from the sale of the plantation in South Carolina, now sold, as preferred by the decree. It was conceded by counsel that the sum of twenty-two hundred and seventy-four 64-100 dollars was due and first payable to the bank, but it was disputed whether it bore any interest whatever. The National Bank of Augusta claimed interest from February 2d, 1871, on the principal sum, as one the record is established and bears interest, and, in the event it was not allowed, then interest from February 1st, 1878, the date of the final decree in this case directing this sale. The other parties to the decree claimed that no interest whatever to the time of payment should be allowed to the bank. After argument had, it is ordered and decreed that after the expenses of sale and costs of court, that the receivers pay over to the National Bank of Augusta, as solicitor, the sum of two thousand two hundred and seventy-four dollars without interest. That the balance remaining be distributed pursuant to the said decree of February 1st, 1878, and in accordance with its requirements, including the widow's dower."

this the bank excepted.

W. H. MILLER, for plaintiff in error.

ISAAC T. SHEWMATE; J. S. & E. B. HOOK; H. CLAY  
W. H. MILLER, for defendants.

W. H. MILLER, Justice.

fund was in the hands of receivers appointed by the court of chancery under a decree made by Judge Pottle. The law and facts of the case. The fund was raised

from the sale of a plantation in South Carolina, belonging to the estate of Isaac T. Heard; the money was claimed by Mary E. Heard and children, under a marriage settlement between Mary E. and Isaac T., her husband, and by creditors of Isaac T. Heard & Co.; and, among these creditors is the National Bank of Augusta. A distribution of the fund was made by Judge Snead acceptable to every body interested, except that the National Bank of Augusta claimed interest on its part of the fund, under the decree of Judge Pottle, and Judge Snead held that it was not entitled to interest, and it excepted, so that the sole question is whether, under the decree, the bank has the legal right to interest?

In respect to interest a decree has the same force that a judgment does when it contests with other liens or claims for money, Code, §§4217, 4215; but this refers to a decree *in personam*, binding upon all the property of the debtor, and rendered against the defendant thereto, without reference to specific property to be sold thereunder, and the fund to be divided according to the same decree. The very same decree which gives the bank part of this fund, raised from this chancery sale and held by the receivers, also gives other parts thereof to other parties. If the claim of one party under the decree is entitled to interest, so is the claim of every other party thereto; and if all have interest, it is evident that there will not be money enough to pay all, principal and interest. The decree not only provided that the land be sold, but it directed how the proceeds should be applied. It says that so much money shall be paid to each in gross. Interest on no claim is mentioned. Therefore it would seem that none was intended. If, before the sale, the plantation was rented, and there be such a fund also in the receivers' hands, that, of course, after paying expenses, will be divided in proportion to the part which each party gets in the division of the fund raised from the sale of the plantation, unless it has gone to taxes, or other ex-

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Gray Bros. *et al.* vs. Gray.

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necessarily applied to the plantation; but that is  
 of this fund. This is *the proceeds of sale*, and is  
 of by the decree. Whether the decree be right  
 is not the question here. The question is simply,  
 does it direct that the proceeds of the sale be di-  
 And we are clear that it divides that fund without  
 . There is, therefore, made to appear to us from  
 cord no error in the judgment of Judge Snead deny-  
 the plaintiff in error interest on its part of the  
 already distributed by the former decree in the con-  
 tion of the law.  
 ment affirmed.

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GRAY BROTHERS *et al.* vs. GRAY.

ny is granted in cases pending for a divorce, and in suits  
 there is a voluntary separation between the parties, or where  
 wife, against her will, is abandoned by the husband. In these  
 cases, where the husband fails to make provision for the  
 rt of the wife and minor children, equity may compel him  
 o by decree.  
 equity will, by injunction, prevent the husband from alienating  
 roperty to defeat alimony, being well established, if others co-  
 ce with him to perpetrate such wrong, the same remedy is  
 r as against them.

nction. Husband and wife. Alimony. Before  
 SIMMONS. Houston County. At Chambers. April  
 1880.

orted in the opinion.

E. COLLIER; W. C. WINSLOW, Jr., for plaintiffs in

CAN & MILLER, by brief, for defendant.

ORD, Justice.

D. L. Gray filed her bill in equity setting forth  
 er husband, P. N. Gray, on the seventh day of



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*Gray Bros. et al. vs. Gray.*

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February, 1880, abandoned her, and has since that time written to her that he never intended to return; that he made no provision for the support of herself and their infant child, although possessed of ample means to do so; that just before leaving, with the intent and purpose to defeat and prevent her from getting that support which the law would give them, he sold, or pretended to sell, to Gray Brothers, the defendants, his near relatives, all his real and personal estate with knowledge on their part that such was his purpose. She further sets forth that even if the sale were a real one, that the money has not been paid, but held by the purchasers, and if not real but a pretended sale, as she believes it was, the ownership is still in P. N. Gray, her husband, and that this transaction was had to defeat the rights of herself and child. It is also alleged that his land had before then been rented for the present year to the defendant, Sandifer, for nine bales of cotton, for which he gave his note, and if it has been traded, that the purchaser as well as the said Sandifer, had full notice of the purpose and intent of her said husband by trading it to defeat the just claims of herself and child.

The prayer of the bill is, that permanent alimony may be decreed to them of her said husband, P. N. Gray, to be made chargeable on the land if he still has the title, and that the said pretended sale of the real and personal property be set aside, and declared null and void, and if the sale stands then, that the money be paid into court to be directed by its final decree. She further prays the appointment of a receiver to take charge of the said property pending the litigation, to hold it subject to the order of the court, and that injunction be granted restraining defendants, Gray Brothers, from paying over any money to the said P. N. Gray, or selling or transferring any of the said property, and the said Sandifer from paying the said rent note.

The chancellor on the foregoing bill granted an order

upon its hearing, granted an injunction and appointed a receiver, to which order the defendants excepted and assigned the same as error.

The question, therefore, for our decision is, did the court, under the facts stated in complainant's bill, commit error?

Alimony is granted in cases pending for a divorce, and where there is a voluntary separation between the parties or where the wife, against her will, is abandoned by her husband. In these latter cases, where the husband makes no provision, equity by a decree may compel such provision for the support of his wife and children. To this end, therefore, she may file her bill setting forth fully her case, and the judge may hear the case in term or vacation, and grant such order as if based on a pending libel for divorce, to be enforced in the same manner, together with any other remedy applicable to a court of equity. Code, §1746.

In the case before us, the complainant has sought the relief authorized by law against the husband, but has neglected the others parties, whom she charges as being in conspiracy with the husband to defeat her of her lawful share. The aid of equity by injunction to prevent *the* husband from alienating his property to defeat the wife in her alimony, has been often sought pending application for divorce, and always recognized when a proper emergency is shown. High on Inj., §843.

It being a well-established doctrine as to the husband and others seek to aid and co-operate with him to perpetrate wrong upon the wife, then both upon principle and authority they may be restrained therefrom by like orders as exist against the husband. 4 Gill, 105.

The allegations of complainant being issuable, are to be sustained on the hearing of the bill, by sufficient evidence to show that the co-defendants of the husband conspired with him to defeat and deprive her of per-

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MOSES vs. Watson.

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manent alimony, by collusive possession and pretended purchases of the property named; or to be overcome by showing that they are untrue and without foundation in fact; in either case it is but just and equitable that the *status quo* should be preserved until the truth shall be made to appear.

We therefore affirm the judgment of the chancellor in granting this injunction, but hold that the appointment of a receiver was premature, in view of the fact that no insolvency is charged, and that there is an intervening court before the promissory note falls due, as well as the power of the injunction now of force over the parties.

Judgment affirmed, with directions.

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MOSES vs. WATSON.

1. A bill in equity was brought by a married woman against a manufacturing company, her husband as her trustee, two non-residents, and their attorney in Georgia. It alleged that stock of the company was held by her trustee, that he, without her knowledge, transferred the certificate in blank to pay his own debts, that the transfer was to one of the non-residents, who has since transferred to the other, and the latter holds for his benefit or for his creditors, that their attorney had the certificate in his hands, and had notified the company not to pay dividends to her, although the certificate (which also contained power to transfer stock on the books) showed the trust on its face, thus interfering with her rights. The object of the bill was to enjoin the payment of dividends to the attorney, to have the certificate delivered up, her trustee removed, and a new certificate issued to her :

*Held*, that the bill was not demurrable for want of equity, or for misjoinder of the attorney with the company.

2. The superior court of the county of the company had jurisdiction, although the attorney lived in another county.
3. It appearing that one of the non-residents had died, and no representative of the estate being made a party, and the other had not been served, but that their attorney in this state, who was in possession of the stock certificate, had been served, there was no error in allowing the case to proceed to final decree.

Jurisdiction. Practice in the Superior Court.  
Judge CRAWFORD. Muscogee Superior Court.  
Term, 1879.

Watson filed her bill, alleging, in brief, as set out in the head-note and the decision. Moses pleaded demurrer, alleging that he was a resident of Fulton county while the bill was filed in Muscogee. The plea was overruled. He then demurred to the bill for want of interest because he was not connected with the relief sought against the manufacturing company. The demurrer was overruled. Complainant suggested the death of the non-residents, and dismissed the bill as to them. It was also shown to the court that the other non-resident (the last transferee of the stock) had never been served, but that his attorney, Moses, who held the certificate of stock, had been served. The court allowed the bill to proceed to final decree, which was in favor of complainant. Defendant, Moses, excepted.

MOSES, by brief, for plaintiff in error.

BRADY & BRANNON, for defendant.

Justice.

As a bill filed by Mrs. Watson against the Columbia Manufacturing Company, of Muscogee county, Georgia, and as her trustee, and Brooks and Statesberry, residents of this state, and Moses their attorney at law, residents of Fulton county. It alleges that a certain stock of the company, held by her husband, her trustee, is now in possession of Moses, as attorney for the non-resident defendants, who has notified the company not to pay her dividends thereon; that the stock of stock was transferred in blank by her husband without her knowledge and consent for his own interest to those parties; that it showed on its face that

her husband held it in trust for her, and the prayer is that Moses, who holds the certificate thus transferred in blank and with power to transfer it on the books of the company, be decreed to deliver up the certificate, and that the company issue another certificate to her in her own right on the removal of her trustee, for which she prays. To this bill Moses demurred, and the court overruled the demurrer.

The grounds of demurrer are, that the party has a complete remedy at law as to Moses, by suing him in trover in Fulton county, and not forcing him to litigate in Muscogee, and that he is not connected with the company, or the prayer against it.

1. We think that the bill has equity in it against both defendants, against the company, because it seeks to enjoin the payment of dividends on the transferred stock, and the issue of new stock by it to the complainant, and against Moses, because he has the certificate, and by his notice has deprived complainant of the use of her stock; and that both are so connected that complete relief cannot be given without making both parties in equity. The parties that Moses represents are beyond the jurisdiction of the court; he has the certificate fraudulently transferred by the trustee, it will be in his hands a cloud on her title—to say the least—and she has the right in the same proceeding to remove it and get the unclouded stock transferred to her with a new certificate issued to herself—her trustee being removed, as she also prays in her bill.

2. So also in regard to the plea to the jurisdiction. It was properly overruled; because substantial relief was prayed against the company in Muscogee, and therefore Moses could be brought there.

3. Nor do we find that the court was wrong in permitting the complainant to proceed and have a final decree, when Brooks was dead and no representative of his estate made a party, and when Statesberry, being a non-resident, was not served.

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Daniel vs. The State.

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cess of the court could reach neither Brooks' wife nor Statesberry. Moses, their counsel, had been in Georgia, in his possession; the subject of the suit was here, and the decree for the commission of the crime on the facts, which do not seem to have been contested. 40 *Ga.*, 408; 27 *Ga.*, 336; 55 *Ga.*, 546; 12 *Ga.*, 130; Code, §§151. The decree was affirmed.

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DANIEL vs. THE STATE OF GEORGIA.

trial of a criminal case, that certain witnesses heard a statement from the defendant say that he had committed the crime, which was inadmissible.

Though the magistrate had been allowed to testify as to the statement of the defendant at the committing trial, it could not have the result.

Verdict. Evidence. New trial. Before Judge Dougherty Superior Court. October Term,

and in the opinion.

ARNHEIM; D. A. VASON, for plaintiff in error.

GLEMMING, solicitor-general, by D. A. RUSSELL, for the State.

ORD, Justice.

There were two several indictments against the plaintiff in the superior court of Dougherty county for larceny, the specific crime being cattle stealing; he was found guilty in both cases, moved for a new trial in each case, which was refused and he excepted.

The two cases were heard in this court together, and the judgment therein will be so pronounced.



One of the grounds in each case relied upon by the defendant was, that he offered two witnesses, viz: Maly Johnson and Minerva Jenkins to prove that they had heard Henry Dixon say that he had stolen the steers for which the defendant was indicted, and that he was sharp enough to get out of it, which testimony was rejected by the court, and the defendant assigned that as error. The testimony in the record shows that the defendant, shortly after the loss of the property, had carried it to Albany and there sold it.

1. The rule is too well settled to be disturbed, that the possession of stolen property immediately after it is stolen, puts upon the possessor the burden of proving that his was not a guilty possession.

These witnesses were therefore offered to remove this legal presumption of the defendant's guilt, by showing that they had *heard* one Dixon *say* that he had stolen the steers. We are at a loss to see how, under any well defined or even loose principle of law, this testimony was admissible. To allow such hearsay as this to rebut and overcome so strong a legal presumption of guilt, would be about equivalent to holding that if the prisoner could get some one to *say* that he committed the crime for which the accused was indicted, and then offer witnesses to prove that they heard it said, then, in all such cases, it would be the duty of the jury to acquit. No court within our reading has so held, and this will not certainly be the first to establish such a precedent.

2. Another, and a separate ground, taken in one of these cases is, that the court refused to allow the magistrate presiding at the commitment trial to testify as to the statement made by the prisoner at that time. In preliminary trials the court shall always permit the defendant to make his own statement of the transaction. Whenever such statement is made it shall be reduced to writing and returned to the proper court with the papers, in the event of a commitment. Code, §4733.

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 Williams & Co. vs. Hart.
 

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there is a statement, and this requirement of the  
followed, it is "the highest and best evidence as  
the defendant did state." 54 Ga., 156.

But below may have rejected this testimony be-  
cause the statement was not reduced to writing as the law  
required, and that to allow it as offered, would have been  
to give the defendant an opportunity to introduce his own  
evidence to support his innocence. Be that  
whatsoever it may, the statement thus sought to  
be introduced was, that he had received the stolen  
property from Dixon, and if admitted, could not have  
been the verdict, which was right under the law and  
evidence.  
The verdict was affirmed.

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 WILLIAMS & COMPANY vs. HART.

Before sale, a levy would be held insufficient if made  
on the following terms: "I have this day levied the within *fi. fa.*  
on one hundred acres of land as the property of James B. Hart,  
one of the defendants, said property being situated in, and in the  
county of, Union Point, Greene county, Georgia,"—(Union Point  
an unincorporated village). But after sale has been made,  
the rights of a purchaser have intervened, it should be left to  
the jury under all the facts of the case, to say whether the levy was  
valid, and the *fi. fa.*, with this entry upon it, should be allowed  
to stand for them.

It is the duty of the sheriff to state in his entry of levy who is in  
possession of the property, and therefore his entry is evidence on  
that point; but it is not a part of his duty to state who died in pos-  
session, and if he volunteers to make such statement, it is not  
binding on the fact. Such an entry would not relieve the plaintiff  
of the *onus probandi*.

The understanding of witnesses as to what was levied on and  
the facts without any statement of facts on which such understanding  
was based, was inadmissible.

It was held that as a debtor remains in possession of property which once  
was sold to him, and which his creditor is seeking to condemn as



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Williams & Co. vs. Hart.

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fraudulently conveyed, his declarations, though made after he has parted with the formal paper title, may be given in evidence for the creditor against the claimant. It makes no difference that the claimant bought at a sheriff's sale, and not at private sale from the debtor.

5. Where counsel, in argument, goes outside of the testimony, it is the duty of the court, on objection made by opposing counsel, to settle the fact as to what was sworn to by the witness. A statement by the court that a witness said a certain thing, is not, in a legal sense, an expression of opinion as to the evidence. What is sworn is testimony; what is truth deduced therefrom is evidence.
6. This case has not been fully tried, so as to bring out and submit to the jury the whole truth on the issue of fraud, and therefore a new trial is ordered.

Sheriff. Levy and sale. Evidence. Debtor and creditor. Fraud. Claim. Title. Practice in the Superior Court. Before Judge LAWSON. Greene Superior Court. September Term, 1879.

To the report contained in the decision it is only necessary, in connection with the third, fourth and fifth divisions, to set out the following, which were among the grounds of the motion for new trial:

(1.) Because the court erred in admitting the following testimony of claimant, James F. Hart: "It (the sheriff's deed) was intended to cover the whole property. I understood that it was sold, and that the deed covered all the property." (Other witnesses also stated their understanding.)

(2.) Because the court erred in refusing to allow plaintiffs' counsel to prove by the witness, J. M. Mitchell, that defendant in *fi. fa.*, J. B. Hart, two or three days after the sale testified about, said to witness: "I have the property now where I want it. It is worth \$25,000.00—more than double the amount of the mortgages. Jimmie (meaning claimant) is a clever fellow, and will do what is right about it; he will divide out."

(3.) Because the court erred in refusing to allow plain-

Williams & Co. *vs.* Hart.

el to read in evidence to the jury the deposition of the witness, W. H. Snowden, the court ruling out upon the ground that the admissions of defendant *fa.* testified about by this witness were not against the claimant.

ause, while counsel for plaintiffs were arguing to the jury the facts in the case, and representing to the jury a witness (Sibley) swore that the mortgage property in dispute was paid off by claimant by a balance of the property and the proceeds of the sale of a balance, counsel for claimant interrupted the testimony and claimed that he was misstating the evidence; the court erred in saying in the presence of the jury that the witness swore that James F. Hart paid off the mortgage debt with the homestead property and the balance in cash.

LEWIS & SONS; C. HEARD; JAS. L. BROWN; J. M. PUMPKIN, for plaintiffs in error.

REED; JNO. C. HART, for defendant.

Justice.

Execution was levied upon a house and lot in the incorporated village of Union Point, as the property of J. B. Hart & Son, defendants in execution; it was claimed by J. B. Hart, and on the trial, under the charge of the court, the jury returned a verdict for the claimant; the court moved for a new trial, it was refused and they

motion is predicated on many grounds, and the court should have granted it on either?

The claimant bought land at a sheriff's sale, as the property of J. B. Hart, consisting of 900 acres more or less for \$100.00 therefor, subject to certain mortgages and the question is whether this house and lot in dispute was covered by that sale, and title thereto

passed to the claimant. It is insisted that under the levy and advertisement then made, title to this house and lot now levied on in this case did not pass, because neither levy nor advertisement covered it in the description of the land given in them. The levy describes the land as follows: "I have this day levied the within *fi. fa.* on nine hundred acres of land, as the property of James B. Hart, one of defendants, said property being situated and lying in and in the vicinity of Union Point, Greene county, Georgia. September 30th, 1874. J. P. Jones, deputy sheriff." The advertisement is as follows: "At the same time and place, nine hundred acres of land, in the vicinity of Union Point, in said county, levied on as the property of James B. Hart, to satisfy a *fi. fa.* issued from Greene superior court, in favor of E. W. Marshall & Co. vs. James B. Hart. J. P. Jones, deputy sheriff."

The sheriff's deed to J. F. Hart followed the advertisement and not the levy, and an equitable plea was filed by claimant to reform it, so as to make it conform to the levy, and describe the nine hundred acres as "in," as well as "in the vicinity of Union Point." The following additional entry disposing of the property was on the *fi. fa.*: "Sold the property levied on by the within *fi. fa.*, the property of James B. Hart, to James F. Hart, for one hundred dollars, this 2d day of March, 1875. J. H. English, sheriff."

To the equitable plea a demurrer was filed (all exception being waived to making the sheriff a party at law to the equitable proceeding) on the ground that this levy was insufficient, and if reformed the deed would be insufficient still, and it would therefore be of no avail to reform it. To the execution and levy going to the jury and to the deed being admitted at all as evidence, objection was also made on the ground that the levy was insufficient to pass title to anybody to this house and lot in this village of Union Point. The demurrer was overruled and the execution, levy and deed were all admitted as evidence, and

grounds of the motion for the grant of a new trial based on the one point, was the levy sufficient title to this house and lot in this village, though incorporated, by virtue of a sale under it? My brethren think, and it is so ruled, that it is a question for the court. Under all the facts, a purchaser having bought it at sale; where the rights of a purchaser intervene, to hold it, but before sale and purchase all agreed the levy would be insufficient. My own judgment is that it is too vague and indefinite a description of title to any purchaser to a house and lot in the village. The only description is "nine hundred acres of land in the vicinity of Union Point." It is not even said it was *known* to be the property of James B. Hart. Such a description should authorize the sale of a house and lots, occupied by different families in a town, though unincorporated, as well as a plantation outside the town, a steam saw-mill, etc., etc., would be, it seems to me, to open the door wide to all manner of fraud, and no man ought to buy under such a levy, improved houses in the town, and expect to hold them. The Code, §3640, declares that the officer making a levy "shall *plainly describe the property levied on*, and the interest of defendant therein;" and section 3641 declares that in the "advertisement he shall give a complete description of the property to be sold, and known the name of the plaintiff and defendant, and the person who may be in the possession of such property." How anybody could imagine that he was to improve property occupied by tenants in a town under an advertisement of land "in the vicinity" of the place escapes my comprehension, and how a levy on "nine hundred acres of land in and in the vicinity of a town" describes houses and lots in the town, it is equally for me to see. My brethren agree that it is a pretence going to show fraud, but that it is for the court to say whether or not the houses and lots were so

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Williams & Co. vs. Hart.

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levied on and advertised as to convey title to the purchaser, while I hold that such a levy and advertisement cannot pass title at all so far as the improved lots, laid off and built upon and occupied in the town, are concerned.

Under the ruling of this court the demurrer to the equitable plea was properly overruled, and the execution and levy and deed were properly admitted as evidence, the weight thereof being for the jury to pass upon on the question of fraud or no fraud between defendant *in fi. fa.* and claimant.

2. The sheriff's levy on the house and lot in the claim case now at bar, declared that James B. Hart died in possession of the land, and error is assigned that the court for that reason ruled erroneously in holding that the burden of proof was on the plaintiff in execution. The sheriff's entry is only evidence where he is empowered by law to make it, and it is thus a lawful entry. All parts of the entry which it is his duty to make are testimony of themselves when it is proved that he made the entry; but no part, which he volunteered to make outside of official obligation to do so, is testimony.

Therefore, it being his duty to say who was in possession at the date of levy, and to advertise the fact, the entry might prove that fact of itself; but when he went on to say that defendant died in possession some time before the levy, that was no evidence of that assertion.

The plaintiff should have proven by the sheriff on the stand as a witness that Hart died in possession after the judgment, and then the *onus* would have been cast upon the claimant. There was other proof to that fact afterwards, but the motion for a new trial on this point is not based on that proof but on the entry and the legal effect thereof.

3. In so far as the court admitted the understanding of witnesses as to what was levied on and sold without their stating facts on which such understanding was based, the ruling was illegal. *Phillips vs. Lindsay*, this term, not yet

d. So not the intention, but the fact of the thing on is evidence thereof. See *Ford vs. Kennedy* (and this term).

The testimony of Mitchell and Snowden was admitted and the court erred in withholding it. It was in that James B. Hart was still in possession of the property levied on, and while in possession said to Mitchell: "The property now where I want it. It is worth five thousand dollars, more than double the amount of mortgages. Jimmy (meaning claimant) is a clever fellow and will do what is right about it. He will divide it with me and to Snowden, on another occasion, he said that the mortgages were satisfied except three thousand dollars, and as to that effect. The claimant is the son of the defendant in *fi. fa.*, and he had announced that the mortgages were ten or twelve thousand or more on the day of the sale. In *Oates vs. Brown*, 59 Ga. 711, it was ruled that so long as a debtor remains in possession of property which once belonged to him, and which his creditor is entitled to condemn as fraudulently conveyed, the *res gestæ* of the fraud, if any, may be considered as in progress, and his admissions, though made after he has parted with the property, though accompanied by a paper title, may, by reason of the continuous possession, be given in evidence for the purpose of establishing the fraud against the claimant." The principle there announced covers this case; for it can make no difference whether the fraud be at private or public sale, by the defendant or the sheriff, if the parties concoct the fraud, and if it is to the prejudice of the creditor and for the injury of the claimant. See also *Denham vs. Kirk* (last term, not yet reported).

Where counsel, in arguing to the jury, goes outside the testimony, it is the duty of the court, on objection by opposing counsel, to settle the fact of what was sworn by the witness; and the statement by the court that the witness said a certain thing is proper, and in a legal sense, the expression of an opinion as to

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Hancock *vs.* Cloud.

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the evidence. What is sworn is testimony; what is truth deduced therefrom is evidence. The judge must say, when there is dispute among counsel, what the witness said on the stand, and he is only prohibited from expressing his opinion as to its truth or its weight.

6. In the view taken by this court of the case as a whole, it must turn on the question of fraud or no fraud. The relationship between the parties, the character of the levy, advertisement, deed, and all the surroundings of the sale, the statement about the mortgages and their amount, and all said by defendant while in possession of the property, are matters proper to be considered and passed upon by the jury; and inasmuch as we all think that the case has not been fully tried so as to bring out and submit to the jury the whole truth on this issue of fraud, we reverse the judgment of the court below and award a new trial.

Judgment reversed.

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HANCOCK *vs.* CLOUD.

1. To suit on notes defendant pleaded as follows: The notes were given for the purchase money of certain land. This had been the property of one Cloud, deceased, whose administrator plaintiff was; he had bought the land at his own administrator's sale; defendant knew this fact, but did not know its legal effect when he bought, nor that his vendor had not paid for the land and had not settled with the heirs, nor that he was insolvent. Defendant has paid part of the purchase money, and offers to pay the balance if the sale to him be ratified and confirmed by the heirs, or to rescind and surrender up the land:

*Held*, that this plea was properly stricken on demurrer, it not appearing that the securities on the administrator's bond are insolvent, or that the defendant has been, or ever will be, disturbed in his enjoyment of the land.

2. Under the act of 1877, providing for the entering of cases after the regular return day, the clerk may certify in his certificate to the record the cause of the delay in transmitting the same, but *aliunde* evidence is not admissible to show that such delay was caused by the excepting party, or his counsel, and that he was not, therefore, entitled to the benefits of this act.

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*Hancock vs. Cloud.*

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trators and executors. Promissory notes. Con-  
readings. Before Judge CRISP. Crawford Super-  
September Term, 1879.

report contained in the decision, it is only neces-  
d that, in support of the motion to dismiss,  
defendant in error offered to read a certificate  
the clerk some time after the date of his certifi-  
record, stating the cause of the delay in trans-  
e papers.

& RUTHERFORD, for plaintiff in error.

EUR, for defendant.

R, Chief Justice.

rs from the record that Noah Cloud brought  
o notes for \$227.35, each against Jas. M. Han-  
cock filed his pleas that the notes were given  
merly belonging to the estate of James Cloud ;  
Cloud was the administrator of James Cloud,  
used the land at his (the administrator's) sale  
e Causey, and then sold the land to Hancock,  
the notes sued on were given. Hancock has  
o cash for the land. At time of trade, Han-  
that Noah Cloud had purchased the land at  
ministrator's sale, but did not know the legal  
uch a purchase, and did not know that Noah  
not paid for the land, and had not settled with  
f James Cloud ; that Noah Cloud is insolvent ;  
did not know that Noah Cloud was insolvent at  
e trade.

ntiff demurred to the defendant's plea, which  
ed, and the defendant excepted.

cloud never made Hancock a deed. Hancock  
ay balance of purchase money if the sale by the  
tor to him be ratified and confirmed by the



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 Branch, Sons & Co. vs. Palmer.
 

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heirs, and offers to rescind the trade and surrender up the land.

1. There was no error in sustaining the demurrer to the defendant's plea on the allegations contained therein. It does not appear therefrom that the securities on the administrator's bond are insolvent, or that the defendant has been disturbed in any manner in the enjoyment of the land for which the notes were given, or that he ever will be.

2. This case was brought here under the act of 1877, and a motion was made to dismiss it on the ground that the delay in not sending it up sooner by the clerk was caused by the act of the plaintiff in error or his counsel, and defendant in error sought to prove that fact by evidence *aliunde* the record. Whilst it would be competent for the clerk to certify in his certificate to the record the cause of the delay, in view of the provisions of the act of 1877, yet *aliunde* evidence of that fact cannot be received.

Let the judgment of the court below be affirmed.

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#### BRANCH, SONS & COMPANY vs. PALMER.

1. While parol testimony is not admissible to vary the terms of a written contract, it is admissible to show the existence of a custom of the trade or business in which the contract was made, of such universal practice as to justify the conclusion that it became, by implication, a part of the contract.
2. The existence of such a custom is a question for the jury.
3. Where the contract was for 600 bales of cotton, to be delivered in different lots and at different times, if upon the shipment of the first lot the vendor had a right to draw for the amount so due, and his draft was not paid, he was not bound to carry out and complete the contract.
4. A sale of cotton for future delivery, where both parties knew that the vendor expected to purchase to fulfil his contract, and to put no skill, labor or expense therein, and none entered into the consideration thereof, but that it was a speculation on chances, would be illegal; but if the cotton was to be bought and delivered at once,

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Branch, Sons & Co. vs. Palmer.

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skill, labor or expense entered into the contract, it would be  
 verdict was supported by the evidence.

ence. Contracts. Custom. Verdict. Before  
 SIMMONS. Bibb Superior Court. April Term,

Branch, Sons & Co. sued Palmer. The declaration al-  
 that he had contracted with them to furnish to  
 parties in Liverpool certain cotton, to-wit: "The  
 Palmer on the twenty-eighth day of October, 1876,  
 our petitioners three hundred bales of cotton of an  
 weight of five hundred pounds each bale, two hun-  
 of said bales being good ordinary at  $9\frac{1}{2}$  cents per  
 , and one hundred bales being middling at  $10\frac{3}{4}$  cents  
 pound; and on October 31st, 1876, two hundred other  
 of cotton—one hundred of which being good ordi-  
 at  $9\frac{3}{4}$  cents per pound, and the other hundred being  
 good ordinary at 10 cents per pound; and on No-  
 vember 1st, 1876, one hundred other bales of cotton, low  
 , at  $10\frac{1}{4}$  cents per pound; all of said cotton was  
 delivered free on board by the said Palmer for the  
 above stated." The breach alleged was that the  
 of cotton having risen, Palmer refused to deliver  
 cotton, although he had possessed himself of it and  
 in the very act of delivering it under the contract,  
 by compelling plaintiffs to buy other cotton at a  
 price.

The defendant pleaded the general issue, and that the  
 act was illegal because it was a mere speculation on  
 prices—each party knowing that no skill or labor was to  
 go into it, but that the cotton was simply to be bought  
 and sold as a speculation on future prices.

At the trial it appeared that defendant shipped the  
 three hundred bales and drew on plaintiffs with bill  
 of lading attached. This draft was dishonored, and there-  
 upon defendant refused to deliver the three hundred bales

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Branch, Sons & Co. *vs.* Palmer.

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or to buy and deliver any more. The jury found for the defendant. Plaintiffs moved for a new trial on the following, among other grounds:

(1.) Because the court admitted testimony to show a universal custom among cotton buyers of drawing with bill of lading attached as soon as cotton was delivered to the railroad. (Plaintiffs' counsel insisted that the contract was in writing, and could not be varied by parol testimony.)

(2.) Because the court refused to construe the contract. (The court stated to the jury that under the contract delivery would have to be made at the places specified before payment could be demanded, unless there was such a custom of the trade as gave defendant the right to draw upon delivery to the railroad. He then defined the kind of custom which would by implication enter into the trade, and left the jury to say whether it existed or not.)

(3.) Because the court charged as follows: "If the proof satisfies the jury that, under a universal usage or custom, Palmer had the right to draw on plaintiffs at sight, attaching the railroad receipt for the cotton to the draft, the refusal or failure of plaintiffs to pay the draft on presentation released Palmer from all liability to send forward the cotton against which the draft was drawn."

(4.) Because the court charged, in substance, that if the contract was for six hundred bales, and plaintiffs ought to have paid the draft for the first three hundred, but failed to do so, defendant was not bound to forward the remaining three hundred.

(5.) Because the court charged that "if both parties were aware that Palmer expected to purchase to fill this contract, and to put no skill and labor or expense into the contract, and that the same did not enter into the consideration of it, but that the same was a speculation on chances, then it was an illegal contract."

(6.) Because the verdict was contrary to law and the evidence.

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Branch, Sons & Co. vs. Palmer.

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tion was overruled, and plaintiffs excepted.  
other facts see the decision.

& RUTHERFORD, for plaintiffs in error.

& ANDERSON, for defendant.

Justice.

was brought to recover damages from Palmer by  
ns & Co. for failure to deliver cottons purchased  
er from the former. Under the instructions  
rt, the jury found for the defendant, and a mo-  
new trial being refused to plaintiffs, they bring  
to this court.

defendant refused to deliver 300 bales of cotton  
ught and shipped, and to buy and deliver any  
use plaintiffs dishonored his draft on them in  
he defendant being a resident of Macon, for  
ousand dollars, which he had drawn on them  
t of the 300 bales so bought and shipped on  
cars at Macon. The contract is in the form of  
ween the parties, and the cotton was to be de-  
ree on board"—"F. O. B." being the initials  
was to be sent to different ports—such as  
Port Royal, etc., etc. The draft was drawn,  
lading attached, when the cotton was shipped  
, and the court allowed evidence to show that  
ne universal custom of the trade. The plain-  
ed and excepted thereto, and also to the charge  
rt to the effect that if such was the custom the  
d have been paid by Branch, Sons & Co., unless  
of the contract took this case altogether out of

going into the common law or our sister states  
on this subject, it is enough to refer to our  
which embodies the substance of the common  
strued by our own earlier decisions on the doc-



trine in respect to customs of this sort, and the effect thereof upon contracts. Section 4 of the Code declares, under paragraph 1, which is on the subject of "Laws of force in this State," that "The custom of any business or trade shall be binding only when it is of such universal practice as to justify the conclusion that it became by implication a part of the contract." So that it will be seen that the custom of a trade is admissible, not as ordinary parol evidence, but as law—entering into the contract just as any other law does. It is not dependent on the rule that parol evidence is inadmissible to vary a writing, nor inconsistent therewith, but upon the ground that the law makes the custom part of the contract, and when the custom is so universal as to become the law of the trade, it becomes by implication a part of the contract, and the contract is to be construed thereby just the same as if it had been inserted therein. Of course, custom can only be proved by word of mouth from the men engaged in the business, and evidence thereof is necessarily in parol, but it stands on quite a different footing from parol evidence of one standing by when a written contract is made, and who undertakes by his uncertain memory to add to or vary the thing set down in black and white at the time the contract was made.

We think, therefore, that the court was right to admit the evidence and to charge the jury thereon to the effect above indicated and as set out in the record.

2. Whilst it is the duty of the court to construe a written contract, whether exhibited by one or by twenty letters, yet whether the custom is established or not by proof is matter for the jury, and therefore the court was right to submit the question to the jury, especially as it appears to us by no means clear exactly what these parties meant by the words and symbols used in the trade, and ordinary parol explanation, as well as the custom of the cotton trade, was essential to decipher and understand them.

3. The plaintiffs contend further that there were several

s for cotton, and not one contract, and that therefore the court erred in its charge that defendant had the right to decline to buy further for plaintiffs after the dishonor of his draft. In the view we take of the case, the contract, as a whole, is one. It is so declared on by the court. It branches out in different specifications, but is declared as one, and springing from one source, the different specifications should be construed together. It is an agreement on the part of Palmer to buy for Branch, Sons & Co. as the latter gave him orders, and at the prices and on the terms and conditions suited. Even if in some respects the contracts may appear several, yet they are dependent covenants—promises resting on mutual consideration to be kept if both sides are faithful to the respective undertakings. Palmer was dependent upon Branch, Sons & Co. for money to buy, just as the latter were dependent on their Liverpool correspondents for funds for their more extensive purchases. Therefore, when his draft was dishonored, he had the right to decline to carry out any part of the contract to buy; he could not tell when another draft, with the proceeds of which he expected to meet his bank account, would be dishonored too.

But we think the court submitted the law on this matter clearly and fully to the jury.

As to the respect to the legality or illegality of the contract, the subject of futures, the court put the question also specially right before the jury. The charge was in substance that if the cotton was a sale by Palmer to plaintiffs to be delivered at a future day, or that both parties knew that Palmer expected to purchase to fill this contract, and to employ skill, labor or expense therein, and none entered into consideration thereof, but that it was a speculation on the part of Palmer, then the contract would be illegal; but on the other hand, if the cotton was to be bought immediately after it was received when bought, and defendant's skill and labor were put into the contract, thus to be at once carried out,

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Maddox vs. The County of Randolph.

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then it was legal. This charge is the substance of section 2638 of our Code, and of course must be law.

Law and facts so entered into the question that the court properly left it to the jury. Code, §2754.

5. The exceptions based on refusals to charge as requested are controlled by the points already ruled; the evidence is sufficient to support the verdict, and the presiding judge approved the finding; therefore, as often ruled, we do not interfere.

Judgment affirmed.

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MADDOX vs. THE COUNTY OF RANDOLPH.

1. A motion to dismiss because the plaintiff, by his pleadings, showed no good cause of action, may be made at any time.
2. Where damage is claimed from a county because of injuries sustained by the falling of a bridge on which plaintiff was riding, the declaration must show that the claim sued for had been presented to the ordinary for auditing within twelve months from the time of the injuries. The auditing referred to is not confined to any particular class of claims, but is applicable to all.

Practice in the Superior Court. Motion. County Matters. Pleadings. Before Judge WRIGHT. Randolph Superior Court. November Term, 1879.

Reported in the opinion.

JOHN T. CLARKE & SON; WILLIAM HARRISON, for plaintiff in error.

ARTHUR HOOD, Jr.; L. S. CHRISTIAN, for defendant.

CRAWFORD, Justice.

The plaintiff in error brought suit against the county of Randolph to recover damages for injuries sustained by the falling of a bridge over which he was riding in said

The defendant pleaded the general issue at the term of the court, and at the trial term the statute of limitations. After the parties had announced ready, for the defendant demurred to the declaration on the ground that it did not allege that the claim sued for had been presented to the ordinary for auditing within twelve months from the time of the injuries, it appearing in the declaration that the injuries occurred on the fifteenth day of July, 1876, and that suit was brought October 1877. The court, after argument had, dismissed the case and the plaintiff excepted.

Objections appearing upon the face of the declaration which would not be good in arrest of judgment were taken advantage of at the first term, and a demurrer should have been taken at that time to have required the defendant within the rule of court, and as time had passed and the general issue been filed, this defence more appropriate to plea than motion. For the ruling by the court there was no motion to set aside and no pretense that the claim had been presented within the twelve months which the court held to be necessary. So that although it was called a demurrer, yet it was a motion to dismiss the case because the plaintiff, by his pleadings, showed no good cause of action, and this may be made at any time.

The question then is, was the defendant liable unless the claim was presented to the ordinary within twelve months from the time it occurred?

The county is made a body corporate, endowed with the exercise of many rights and privileges, as well as with many obligations and responsibilities. Being a body corporate, the law has declared how and in what manner its business with the public shall be conducted, how the public may deal with, how arrive at a settlement, how serve, and *when the claims must be presented*. The duties of the inferior court were originally charged with the management of the financial affairs of the county ;



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Maddox vs. The County of Randolph.

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the law required them to audit all the claims against their respective counties; every claim, or such part thereof as was allowed, was to be registered and the clerk was to give the claimant an order on the county treasurer for the amount. There was, however, one limitation in their favor, which was that "all claims against them must be presented within twelve months after they accrue or become payable, or the same are barred."

The general law now is, that the functions of those justices are performed by the ordinary of each county, who audits and allows every claim, or such part thereof as he may allow, and gives an order on the county treasurer for the same, but the bar of the statute attaches as before after the twelve months have elapsed.

It was insisted on the argument that this was not such a claim as could be audited, and therefore the law did not apply. Why not audit—that is "examine and adjust" the damage? What was the injury? how long was the plaintiff confined from it? how long unable to pursue his usual avocation? what his physicians' bills, medicine, etc.? These were all elements entering into this claim. Even if this, however, be insufficient, a conclusive answer thereto is, that the law makes no distinction between the different classes of claims, but says *all*, and this must necessarily be included.

This ruling is consistent also with a sound public policy in reference to claims that are made against the counties; their business is managed and controlled by officers who are chosen for short periods of time, and to allow delays until those who were in office, and who had knowledge of all the facts surrounding the claims have been displaced by others who know nothing of them, or of the witnesses whose testimony would protect the county, would be to give to the claimants such an advantage as would be unjust and improper.

Judgment affirmed.

## NIX vs. COLLINS.

plaintiff in ejectment or complaint for land must show title in himself; he cannot rely on the weakness of defendant's title. In a complaint for land a plaintiff cannot rely upon estoppel to prevent defendant from disputing his title. If he seeks to recover on equitable title, he should set it up by equitable pleadings.

Verdict. Estoppel. Before Judge SPEER. Camp-  
superior Court. August Term, 1879.

Plaintiff brought complaint for land against Nix. The complaint consisted of parts of three land lots in Campbell county, viz: Half of land lot 78, half of lot 46, and one fourth of lot 19. The chain of title relied on as to the last two parts of lots was as follows: Deed from James Gibson to Duncan Worthan, dated October 16th, 1847; deed from J. W. Cochran to W. S. Zellars, dated January 14th, 1853; deed from W. S. Zellars to plaintiff, dated March 10th, 1873. As to the part of lot 78, the claim was this: Deed from J. S. Cook to J. W. Thomas and W. P. Davis, dated September 23d, 1869; deed from Thomas and Davis to Ballard, dated December 26th, 1870; deed from Ballard to plaintiff, dated March 10th, 1873.

Plaintiff insisted that defendant was estopped from denying his title, because he had induced plaintiff to take it, the transaction being virtually a loan to defendant and a conveyance of title for him by plaintiff until the payment of the loan by plaintiff to obtain it and to pay off certain taxes; also because defendant told plaintiff that the title came through Cochran and Ballard, and were good. The jury found for the plaintiff. Defendant moved for a new trial, which was refused, and he excepted.

For plaintiff: S. BIGBY; L. S. ROAN; JAS. T. SPENCE; H. W. SPENCE, for plaintiff in error.

For defendant: THOMAS W. LATHAM, for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendant in the statutory form to recover the possession of certain lands therein described. On the trial of the case the jury found a verdict for the plaintiff for the premises in dispute. A motion was made for a new trial on the grounds therein stated, which was overruled, and the defendant excepted.

1. It appears from the evidence in the record, that the plaintiff offered in evidence a deed from Gibson to Worthan, and a deed from Cochran to Zellars, and a deed from Zellars to Collins, the plaintiff, as evidence of his legal title to the land sued for, and the question is whether the plaintiff showed such a legal title to the land in himself as would entitle him under the law to recover the possession of it from the defendant? In our judgment he did not, inasmuch as the plaintiff was bound to recover upon the strength of his own title, and not upon the weakness of the defendant's title.

2. It was insisted, however, in view of the facts of this case as disclosed in the record, that the defendant was estopped from denying the plaintiff's title to the land. However that might have been, if the plaintiff had instituted an equitable proceeding to obtain his just rights in view of the peculiar facts of the case, instead of suing for the land upon his alleged legal title, we express no opinion, but we reverse the judgment on the ground that the plaintiff did not show such a legal title to the land in dispute as entitled him, under the law, to recover the possession of it from the defendant in an action of ejectment.

Let the judgment of the court below be reversed.

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 Haywood vs. Lewis, executor.
 

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## HAYWOOD vs. LEWIS, executor.

re *ex parte* making of a writing by a debtor, in which he  
 d to his creditor certain property, whether as payment or  
 is not sufficient to effect a discharge of his surety, it not  
 g that the writing was delivered to the creditor, or that he  
 eived the property.

estate had paid notes in his lifetime, the presumption is  
 would have taken them up. Nor is it overcome by the  
 this case. It is true that the notes were in the hands of  
 was one of the administrators; but he was also the execu-  
 another estate in right of which he held the notes, and was  
 ng to enforce them against the indorser, who was his co-  
 rator.

a case, the defendant insisting that plaintiff had himself re-  
 money from the estate and paid off the notes since the death  
 ate, perhaps it would be proper to admit in evidence re-  
 r money given by plaintiff to an agent in charge of part of  
 e; but the rejection of such evidence will not necessitate a  
 d if plaintiff admits the receipt of the money and relies only  
 pper application to other purposes.

a plea only sets up the right to recover usury paid on the notes  
 he court did not err in limiting the jury to an allowance of  
 ry, although usury may have also been paid on other notes  
 the same parties.

al and surety. Promissory notes. Presumptions.  
 rators and executors. Interest and usury. Plead-  
 charge of Court. Before Judge FLEMING. Chat-  
 erior Court. May Term, 1879.

N. Lewis, as executor of Spivey, sued Alfred  
 d and himself, as administrators of Joseph M.  
 d, deceased, and Alfred Haywood, as indorser,  
 promissory notes made by Joseph M. and in-  
 y Alfred. These notes are thus described:

ne 9th, 1870,	payable at 60 days, for -	\$1,200 00
20th, 1870,	" 30 "	- 1,500 00
ug. 1st, 1870,	" 60 "	- 1,300 00

trial the suit was dismissed as to the estate of



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Haywood *vs.* Lewis, executor.

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Joseph M. Alfred pleaded—first, payment by Joseph M. Secondly, payment by the administrators. Thirdly, usury. Fourthly, the acceptance by plaintiff, Lewis, of a conveyance of property made to him by Joseph M. in satisfaction of the debt, and a release in consideration thereof. Fifthly, the receipt by plaintiff, Lewis, from Joseph M., of a conveyance of property as security for the notes sued on, and the failure of Lewis to record his conveyance and to possess himself of such property, whereby the property became unavailable as security and the risk of the surety was increased, and that the plaintiff took the notes with notice of these things and after maturity.

On the trial, it appeared that the decedent did execute the instrument mentioned in the last two pleas, but afterwards put it away among his private papers; and there was no evidence that he ever delivered it, or that Lewis received the property. On the contrary, after the death of the decedent, the administrators managed the barber-shop as part of the estate (it being a part of the property mentioned in the instrument). Lewis, executor of Spivey, had numerous notes in his hands against Haywood, before the death of the latter. At various times Lewis received money from Haywood, amounting to some \$22,000.00; but he testified that he applied this to other claims, there being no instructions as to application.

Defendant offered to introduce in evidence the entries in a book produced by one Bender, who was clerk in charge of the barber-shop. They showed receipts of money from him by Lewis, and were in the hand-writing of the latter. They were rejected.

The court, in its charge, restricted the consideration of the jury on the subject of usury to the notes sued on, and excluded from their consideration any usury which might have been paid on the other notes, there being evidence on that subject. The jury found for the plaintiff \$3,677.70 with interest from May 10th, 1873. Defendant moved for a new trial, on the following among other grounds:

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Haywood vs. Lewis, executor.

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Because the court ruled out, when offered in evidence for the defendant, entries in a book proved to be hand-writing of John N. Lewis, of cash received by Lewis, headed "Amounts received from Henry on account barber-shop," and amounting to \$10,-

Because the court charged the jury as follows:—  
 "Usury received on the notes in suit on which the defendant is indorser, can be pleaded to the suit, and goes to the extent of the excess of the interest. The indorser is bound to pay the principal and legal interest."

"Usury paid by J. M. Haywood on other and independent contracts to which the defendant, A. Haywood, was not a party, cannot be pleaded as a set-off to the action." "Usury paid by J. M. Haywood in his life on other and independent contracts (if the jury find that usury was paid) cannot be set off in this action in reduction of this debt." [Some point was made as to whether the notes being one connected transaction or several independent transactions, but it is unnecessary to set out the details on that subject.]

Because the verdict is contrary to law and evidence. The motion was overruled, and defendant excepted.

W. M. GUERRARD, for plaintiff in error.

WILLIAM U. GARRARD; J. R. SAUSSY, for defendant.

W. N. Justice.

Spivey, as executor of Spivey, sued himself and Alfred Haywood as administrators of Joseph M. Haywood, and Joseph M. Haywood as indorser, on three promissory notes, payable by Joseph M., payable to the order of Alfred and indorsed by him, one for \$1,200.00, dated June the 9th, 1879, and payable at sixty days, one for \$1,500.00, dated June the 20th, 1879, and payable at thirty days, and the third for \$1,300.00, dated August the 1st, 1870, and paya-

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Haywood vs. Lewis, executor.

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able at sixty days. At the trial the suit was dismissed as to the estate of Joseph M., and proceeded against Alfred Haywood as indorser alone. He pleaded first, payment by Joseph M. in life; secondly, payment by the administrators; thirdly, usury; fourthly, the acceptance by Lewis, the plaintiff, of a conveyance of property from Joseph M., in satisfaction of the debt, and a release in consideration thereof; and fifthly, the receipt by Lewis of a conveyance of property as security for the notes sued on, and the failure of Lewis to record that conveyance and take possession of the property, whereby it became unavailable, and the risk of Alfred was increased and he discharged, and Lewis took the notes after maturity and with notice.

The jury found for the plaintiff \$3,677.70, with interest from May 10th, 1873, and thereupon Alfred Haywood, the only defendant left, moved for a new trial on sundry grounds. The motion was overruled on all of them, and he excepted.

The case of the plaintiff was made out when he produced the notes with the indorsement of defendant thereon, and it was the duty of the jury to find for him the amount therein set out, unless defendant showed a legal reason to the contrary. This he attempts to do by five pleas, and he must offer the proof to support them.

1. The fourth and fifth are not supported, because there is not a scintilla of evidence that the conveyance was ever delivered to the plaintiff, Lewis, by Haywood, or the property mentioned therein turned over to him. Therefore these notes could not have been satisfied by the property which Lewis never received, nor could any conduct of his in failing to record the conveyance which was never delivered to him, have increased the indorser's risk. Unless he got possession of it he could not record it. So there is nothing in the defense set up in the fourth and fifth pleas.

2. If the intestate had paid the notes in money in his life-

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*Haywood vs. Lewis, executor.*

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the presumption is that he would have taken them in *this case* is that presumption rebutted by the fact Lewis, the plaintiff, as executor of Spivey, is also administrator, or was administrator of Joseph M. Haywood or Alfred Haywood, the defendant, was, and is, administrator on that estate. Both plaintiff and defendant occupy the same position in respect to Joseph M's being co-administrators. The presumption, therefore, that said notes being in the hands of Lewis, executor of Spivey, are the property of that estate, and stand unpaid. Has this presumption been removed by proof? If the jury believed Lewis, and they had full power to believe him, he shows how all the money he received from Joseph M. in life was applied to the payment of notes in his possession, and as Joseph M. gave him instructions to apply the \$22,000.00, which he did from time to time receive, to any particular notes, he had the right to apply the money where he saw fit to make payment. We do not see, therefore, why the verdict on the first plea (of payment in Joseph M's lifetime by him) is not sustained by the proof that these three notes were not paid by him when in life.

But it is said that the administrators paid them after Joseph M's death. The defendant, Alfred Haywood, was one of these administrators. He was sworn as a witness in this case, and did not swear that he paid them, or any part of them. The only other administrator is the plaintiff, Lewis, who was also a witness, and testified most positively that he did not pay them, or any part thereof, and that they stood open and unpaid. There is, therefore, no evidence directly showing that either administrator paid them, and the second plea is not sustained by the proof.

On this plea it is argued that error was committed by the court in ruling out the entries in a book produced by the defendant, the clerk or manager of the barber-shop and after Joseph M. Haywood's death, which entries



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showed receipts of money from time to time from Bender by Lewis, in Lewis' handwriting, and it is insisted that this testimony should have gone to the jury. The entries were rejected by the court below, because these matters were embraced in the returns made by the administrator to the ordinary, and the moneys so received were there accounted for. Perhaps it would have been better had the entries been admitted in evidence, but we cannot see how their rejection hurt the defendant. It was not disputed that the moneys were received by Lewis as administrator; but he swore that all were returned and accounted for in the returns; the defendant was co-administrator, and the returns were his, too; it was his duty to see to it that they were properly made, and that the co-administrator properly applied the funds; and if it had not been done by him, it is not easy to see how Spivey's estate ought to suffer thereby. But Lewis swears that these items are all accounted for, and Alfred Haywood produces nothing and swears nothing to the contrary, though he was co-administrator and had equal opportunities both of knowledge and of management of the joint business.

4. This leaves but one other plea, to-wit: the plea of usury. It is insisted that by the application of the usurious interest received by Lewis for the Spivey estate to the principal and legal interest of the notes, they would be paid off, or largely reduced. The jury did allow some reduction therefor. The charge of the court restricted their consideration of usury to the notes sued on—it confined the application of usury paid by Joseph M. Haywood in life *on these notes to these notes*—excluding from their consideration all which had been paid on other notes of which the record shows a long list. By reference to the plea of the defendant, Haywood, it will be seen that the charge of the court gave him all the usury which his plea asked for. That plea is that "plaintiff has from time to time charged and received *as interest on the sums of money in said declaration mentioned, interest at*

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Haywood vs. Lewis, executor.

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rates, to-wit: at the rate of two *per centum* or some other large amount, since the date of *uses of action in said declaration specified.*" The self, therefore, confines the investigation to the aid on the notes specified in the declaration, and had have been error in the court to allow other under that plea. The defendant is bound to set his cause of defense plainly and distinctly, and the more stringent perhaps in matters of usury than in defenses. It is universal, however, in its application readings since the act of 1799, in this state. In this view, it becomes unnecessary to consider the made in regard to these notes being separate and from others in the plaintiff's hands, or linked with one transaction, so as to have usury on any of allowed on these, and applied *pro tanto* to theirishment.

Whether the court was right or wrong on these questions of the charges made, or modified, or refused, as questions of law on a case made by the pleadings, it is that this plea only makes the one defense that previous interest paid *on these notes* has not been credited *them*; and this usury the charge directed the jury credit as *asked for by the plea*. The defendant got asked; he ought not to claim more.

Questions of fact, the ciphering and the calculations have been made by the jury—the law applicable to readings has been correctly given on all matters of the issues made, the presiding judge approves what has been done by the jury, there is evidence to support their finding, and his approval thereof, and the judgment therefore affirmed.

THE COTTON STATES LIFE INSURANCE COMPANY *vs.*  
CARTER.

Whilst it is well settled that all previous negotiations concerning a contract, when the same is agreed upon and concluded, are merged in the written instrument, and that parol proof is inadmissible to add to, vary or take from, the writing. yet when an action was brought alleging that there was a contract between the plaintiff and the defendant which the paper should have contained, but did not, and praying that it might be reformed so as to express the real agreement, or if it should be made to appear that none was ever mutually entered into, that then the defendant should be decreed to refund the money which the plaintiff had paid under a mistake as to the existence of a subsisting contract, parol and written testimony covering the negotiations antecedent to the writing, was admissible to show what the real agreement was, or that there never was any agreement upon which the minds of the parties met.

Contracts. Evidence. Before Judge McCUTCHEN.  
Whitfield Superior Court. April Term, 1879.

Reported in the decision.

SHUMATE & WILLIAMSON, for plaintiff in error.

JOHNSON & McCAMY, for defendant.

CRAWFORD, Justice.

Samuel M. Carter had a policy of insurance on the ten year plan in the Southern Life Company, which failed after he had paid seven annual premiums thereon; a negotiation sprang up between himself and an agent of the Cotton States Company for his insurance with that company on the same plan, which resulted in his taking a policy and paying one cash premium on the same. When the second was about falling due the agent of the company notified him of the fact, and this led to an examination of the policy itself, when it was found, as he claimed, to be wholly different from the real contract made and

into between himself and the company, whilst the plaintiff insisted that it was just as it was made and not altered. The failure to settle the dispute resulted in protracted litigation. Carter brought his suit to reform the contract as defined by the policy, and to make it conform to the bargain as it was made, and as he understood it to have been made, and if this could not be done, then to have the same void as made fraudulently or by misrepresentation, and to refund to him the money which he had paid to the company.

By the consent of the parties it was agreed to submit the questions of fact as well as of law to the judge without the intervention of a jury, and under the evidence he found the contract void, and decreed that the money be refunded. During the progress of the trial the defendant made objections to the admission of certain evidence offered by the plaintiff, which were overruled by the court, and the defendant excepted.

On finding upon the facts, and the decree rendered by the court, the defendant further excepted, and assigns the same as error.

The testimony which was admitted and to which objection was made and overruled was, first, that of Carter, the plaintiff, next a letter written by I. W. Avery, an agent of the company, to Carter, and some other evidence, all of which was about, but anterior to, the written contract. The ground of the defendant's objection was, that everything which was said or written before the execution of the contract was presumed in law to have been merged in the contract, and could not be contradicted or varied by extrinsic evidence. The exception taken to the finding and decree was, that the former was not supported by the evidence, and the latter was unauthorized by the law.

The question is better settled than the principle that all oral negotiations concerning a contract, when the parties have agreed upon and concluded, are presumed to be merged in the written contract. And it is equally well



settled that parol proof is inadmissible to add to, take from or vary, a written contract; and whenever the contract itself is sued upon, these principles apply and govern in the absence of an allegation of fraud, accident or mistake in the execution thereof. But the case before the judge below was not upon the enforcement of this contract by the Cotton States Company against Carter; it was a suit by Carter, alleging that there was a contract between the company and himself, which this paper should, but did not contain, and praying that it might be *reformed* so as to express that contract. But if it should be made to appear that none was ever mutually agreed upon, that then the company should be decreed to refund the money which he had paid under a mistake as to the existence of a subsisting contract.

Such suits are recognized and enforced by the law, are often resorted to, and the real question to be tried is, *what was the contract?* The burden is upon the party attacking the writing, and he must bring proof sufficient to overthrow it, but to exclude all testimony and hold that because it was in writing it must not be changed, would be to deny relief in cases where it has always been granted. The very issue made demanded the admission of the evidence, and the court did right in ruling it in.

The testimony on the part of the plaintiff was sufficiently strong to warrant the finding. That there was ever a contract which had the assent of both parties does not appear by the proof; the plaintiff evidently thought that his policy with the Southern Life Company, with its seven annual premiums paid upon it, left only three more to be paid to the Cotton States Company; whilst that company intended to accept the old policy for the increased risk of insuring him at the age of fifty years, as though he were but forty-three, and to be paid ten annual premiums as of one at that age. The decree was but the legal consequence of the finding on the facts, and the judgment must be affirmed.

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Mayor and Council of the City of Columbus *vs.* Flournoy & Epping *et al.*

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MAYOR AND COUNCIL OF THE CITY OF COLUMBUS *vs.* FLOURNOY & EPPING *et al.*

ance of a city assessing "on all gross sales of cotton on commission, by warehousemen, factors, etc., one-tenth of one per cent.," conflict with the act of 1873, which provided that municipal corporations of this state shall not levy or assess a tax on cotton, or on the proceeds thereof;" and injunction was properly granted to restrain enforcement thereof.

ction. Municipal Corporations. Before Judge Muscogee County. At Chambers. April 13th, 1880.

only necessary to add to the report contained in the opinion that Flournoy & Epping *et al.*, filed their bill against the mayor and council to enjoin the enforcement of an ordinance of the city of Columbus assessing one-tenth of one per cent. "on all gross sales of cotton on commission, by warehousemen, factors," etc. The injunction was granted, and defendant excepted.

WILLIAMS; PEABODY & BRANNON, for plaintiff

FORD & GARRARD, for defendants.

R, Chief Justice.

was a bill filed by the complainants against the defendant with a prayer for an injunction on the allegations contained therein. The chancellor, after hearing and considering the same, granted the injunction prayed for. The defendant excepted.

only question involved in this case is the legal validity of the following tax ordinance passed by the defendant: "On all gross sales of cotton on commission, by warehousemen, factors, etc., one-tenth of one per cent." By the first section of the act of 1873, it is

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Ludden & Bates vs. Morrow.

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declared "that from and after the passage of this act municipal corporations of this state shall not levy or assess a tax on cotton or the sales thereof." The defendant is a municipal corporation of this state, and by its ordinance has levied a tax on all of the gross sales of cotton made by the complainants on commission as warehousemen, factors, etc. This is not a tax on the *business* of the complainants as warehousemen or factors, but it is a specific tax on all gross *sales of cotton* made by them on commission, which the first section of the act of 1873 expressly prohibits the defendant from doing, and therefore the ordinance is in violation of that act.

Let the judgment of the court below be affirmed.

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LUDDEN & BATES vs. MORROW.

The evidence being conflicting, and no error of law complained of, this court will not interfere with the discretion of the court below in refusing a new trial.

Verdict. New trial. Before Judge HILLYER. Clayton Superior Court. March Term, 1879.

Reported in the decision.

JAS. T. SPENCE; J. L. DOYAL, for plaintiffs in error.

W. L. WATERSON; STEWART & HALL, by H. C. PEEPLES, for defendant.

JACKSON, Justice.

This was an action of trover for a piano brought by Ludden & Bates, on the following state of facts: The piano was sold, or leased at first, to Key by this contract, to-wit:

reement made this twenty-ninth day of January, 1874, between Ludden & Bates, of the one part, and C. A. Key, of the other part, to wit, that Ludden & Bates have leased to Key one piano (it) for seventeen months from date, for \$350.00, for the use of the piano aforesaid, to be paid as follows: \$100.00 cash, balance \$250.00, to be paid month regularly in advance from the above date. It is provided that if at the end of the said seventeen months the said Key shall have paid said \$350.00, then Ludden & Bates agree to deliver the piano, and to execute a bill of sale thereto. It is further provided that the piano is not to be removed from the residence of Key during the continuance of the lease, without the written consent of Ludden & Bates, and a failure to pay the aforesaid sum, or removal or attempt to remove the piano without the consent of Ludden & Bates, shall void the lease at their option, and they shall have the right to remove the piano from the dwelling of Key and remove the instrument. It is expressly understood that Ludden & Bates do not part with, nor does the title until all said money is paid."

About the expiration of seventeen months \$100.00 was paid upon the piano, and on the ninth day of February, 1875, a note at thirty days was given for \$165.70, the balance due on the contract. Some time thereafter Ludden & Bates delivered the piano to the defendant and delivered the same to him, and this suit is brought to recover it. The note for \$165.70 was not paid, suit was instituted thereon in August, 1875, a plea filed in defense, and judgment rendered for Ludden & Bates against Key. The defendant, when he bought the piano, was ignorant of the condition of the trade or the title to the piano.

The plaintiffs did not testify in this, the trover was examined the defendant and Key. The defense was that when the note was given, it was expressly understood by the parties, that the lease and first contract were void, and that by virtue of a new contract then and there made, the title passed to Key, and from him afterwards to the defendant.

The court left that question to the jury, charging to them that under the instrument in writing first made, the title was reserved in Ludden & Bates, and they must find for the plaintiffs unless "a subsequent contract was entered into, and it was the intention of the parties, and so understood



by them, that the terms of the first contract be abrogated and at an end:" that it made no difference that defendant was an innocent purchaser, if the original contract had not been abrogated, and was of force when Key sold to defendant, then the latter got no title because Key had none to convey; that usually a note is merely a liquidation of a debt and does not operate as payment, but only fixes the amount due on the accounting; but if the parties, both of them, intended it to operate as a settlement and termination of the first contract, then the title passed when the latter contract was made.

No exception was taken to the charge, the jury found for defendant, and a motion was made for a new trial solely on the ground that the evidence does not support the verdict, and therefore it is against law: the presiding judge overruled it, and plaintiffs bring the question here.

Key testified that he "did have a settlement and give the note, and this he understood to be a final settlement of the matter." The plaintiffs introduced him and did not testify themselves.

They sued on the note first, and only on failure to collect the money on it, brought suit for the piano. The positive testimony of Key, added to the circumstances that neither one of plaintiffs testified, and that they abandoned pursuing their right to the piano until their failure to collect the judgment on the note, is sufficient to sustain the verdict. The facts make substantially a conditional sale, or agreement to sell, at the expiration of the lease, the condition being the payment of all the purchase money, 61 *Ga.*, 230; but it is certainly in the power of the parties to dispense with the condition if they desire to do so—to substitute a promissory note, payable at bank, for the cash or part of it, by a new contract. According to the finding of the jury, they did this; and thereby the title passed to Key.

Whilst we think that it would have been much more satisfactory had the evidence shown a clean bill of sale,

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The Western and Atlantic Railroad *vs.* Sawtell.

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ast a surrender of the old contract when the new  
s made, and whilst our finding might have been  
t from that of the jury on account of the absence  
proof, yet the silence of plaintiffs in respect to the  
contract and the positive testimony of Key thereon,  
evidence sufficient to sustain a verdict in favor of  
cent purchaser without notice, especially when  
dict is approved by the presiding judge.  
ment affirmed.

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WESTERN AND ATLANTIC RAILROAD *vs.* SAWTELL.

tort for which damages are claimed be felonious, the plain-  
st allege and prove a prosecution therefor, or a valid excuse  
failure to prosecute. Such prosecution may be before suit  
at, at the time of the commencement of suit, or concurrent  
with, which means *pendente lite*.  
h a case it was not error to instruct the jury as to what con-  
d a felony, and then to submit to them the question as to  
er the killing of the deceased was a felony or a misdemeanor.  
as it error further to charge, that a homicide resulting from a  
on of trains was *prima facie* felonious; that the burden was  
plaintiff to remove that presumption by proof before it could  
uced to a misdemeanor, and that if the presumption was not  
ed, then it must appear that the criminal prosecution had  
place as required by law.

Pleadings. Evidence. Criminal law. Before  
McCUTCHEN. Whitfield Superior Court. April  
1879.

rted in the decision.

ISON & McCAMY, for plaintiff in error.

MATE & WILLIAMSON, for defendant.

ORD, Justice.

case was brought before this court and is reported  
65—16

in the 61st *Ga.* 567, and the controlling question there was, so far as is material to this, that neither prosecution, nor sufficient legal excuse for failure to prosecute, was shown; and that the homicide of a railroad passenger by means of a collision, was *prima facie* felonious and the plaintiff must prosecute for the felony, or allege and prove that there was a good reason why it was not done. Upon the new trial which was granted, the plaintiff amended her declaration by alleging substantially that the negligence charged against the agents and servants of the railroad was not such as to impute to them a felony under the laws of this state, but was the omission of that discretion and caution in the performance of a lawful act, which was made only a misdemeanor and punishable as such. And she further alleged that a prosecution was instituted and conducted, with the earnest purpose of bringing the party who caused the homicide of her husband, for which she was suing, to punishment, if guilty of a violation of law, but that said effort to prosecute resulted in a finding by the grand jury of Fulton county where the act was committed of "no bill." She further alleged that the said agent was not guilty of a felony but of the offence of involuntary manslaughter in the performance of a lawful act without due caution and circumspection. The defendant filed pleas of not guilty, and that the homicide, if it occurred, was the result of the criminal negligence of one William Sheridan which amounted to a felony, and that the plaintiff had instituted no prosecution against him as required by law. Upon the issues thus made up the parties went to trial, and the jury found in favor of the plaintiff. The defendant being dissatisfied with said verdict, made a motion for a new trial which the court overruled; exceptions thereto were filed, and the case is before us again for consideration and judgment.

1. The motion for a new trial on the ground of errors committed will be controlled by the construction of section 2970 of the Code, the pleadings in the case, and the

mitted on the trial. A physical injury done to gives a right of action unless the person inflicting is authorized or justified under some rule of e, §2968.

2970 declares that "If the injury amounts to a defined by this Code, the person injured must ultaneously, or concurrently, or previously, pros- the same, or allege a good excuse for the failure te."

be seen that there is no injury for which a right lies, that requires the wrongdoer to be prosecu- a recovery can be had, except where it amounts y. If therefore the wrong be a felonious one, ff must allege and prove a prosecution, or a se for the failure so to do; if it be only *prima* ious, but in fact otherwise, he must make such egations as will maintain his action in court, and the trial support his allegations by proof that s less than a felony. The plaintiff in the court her amendment brought the case within the w here laid down. She had therefore the bur- of upon her, if it were a felony, to show prose- a legal excuse for the failure; if but a misde- d yet *prima facie* felonious, to rebut that pre- which the law fixes upon the slayer where the s admitted or proven.

on was made upon the time at which the prose- uld have taken place. It may have been before nced her suit, at the time of its commence- concurrently therewith, which means *pendente* en so done the requirement of the law would d with.

dge committed no error in instructing the jury constituted a felony, and then submitting to uestion as to whether the killing of the de- a felony or a misdemeanor; nor in instructing a homicide resulting from a collision of trains

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Brown, administratrix, vs. Groover, Stubbs & Co.

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was *prima facie* felonious, and that the burden was on the plaintiff to remove that presumption by proof before it could be reduced to a misdemeanor; and further, that if the presumption were not removed, then it must appear that the criminal prosecution had taken place as required by law. The case made by the pleadings under the law, made it the duty of the judge to give them these instructions, and when so given it was their duty to apply the facts as shown by the proof thereto, and find a verdict accordingly. We hold that a suit for an injury done, though resulting from a homicide and therefore *prima facie* felonious, may, by proper averments, be declared to be but a misdemeanor and hence not demurrable, and if shown to be true by the proof, then the verdict will be maintained. And that the *jury*, under the rules of law which are to govern them, and not the *court*, are to pass on the act and say whether it was a felony or a misdemeanor.

Judgment affirmed.

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BROWN, administratrix, vs. GROOVER, STUBBS & COMPANY.

1. A case was tried at the March term, 1879, of Washington superior court. At the same term defendant made a motion for a new trial, which was filed and served. A brief of evidence was also filed, subject to the revision and approval of the court. Subsequently, plaintiffs' counsel took it into his possession for the purpose of examining the same, but was not then asked to agree to it, and never promised to do so. Court was adjourned until the second Monday in June, but the adjourned term was not held on account of the sickness of the judge. At the next regular term the brief was submitted for the revision and approval of the court, still not agreed upon by counsel. The court indorsed on the brief that it had for the first time been submitted to him, and that six months having elapsed, he was unable to certify whether it was correct or not, though he recognized the correctness of portions of it. He dismissed the motion for new trial because no brief of evidence had



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Brown, administratrix, vs. Groover, Stubbs & Co.

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and under the approval and revision of the court, as required

the indorsement of the judge did not amount to an approval  
brief of evidence.

was no error in dismissing the motion for new trial, the ina-  
the judge to approve the brief of evidence resulting from  
es of the movant in not presenting it sooner for approval.

trial. Practice in the Superior Court. Before  
HNSON. Washington Superior Court. Septem-  
, 1879.

ed in the decision.

LANGMADE; B. D. EVANS, for plaintiff in error.

WARTHEN; R. W. CARSWELL, for defendants.

, Chief Justice.

ears from the record and bill of exceptions in  
that on the trial of an issue formed upon an  
of illegality, the jury found a verdict in favor of  
iffs. The defendant during the March term of  
, 1879, at which the case was tried, filed a motion  
trial, which was served on plaintiff's counsel,  
filed a brief of the evidence subject to the revis-  
approval of the court. After said brief of evi-  
s filed, plaintiffs' counsel took it into his posses-  
the purpose of examining the same, but was not  
agree to it at that time, nor did he ever promise  
at any time. Said court was adjourned to the  
onday in June, 1879, but owing to the sickness  
dge, the said adjourned term of the court was  
and all the business in the court went over to  
regular term thereof, held on the first Monday in  
er, 1879. When the case was called in its regular  
on the motion docket at the September term, 1879,  
tion of the court was called to the fact that

there had been no consent of counsel indorsed on the brief of evidence, and the same was then submitted to the court for its approval and revision. The presiding judge made the following indorsement upon the paper purporting to be a brief of the evidence: "This brief of evidence is presented to me for approval on this day for the first time. Six months having elapsed since the trial, I am not able to certify whether it is correct or not. My memory of the evidence is not sufficiently distinct to enable me to speak with any certainty of its correctness or incorrectness. I recognize the correctness of portions of it. September, 18th, 1879." The plaintiffs' counsel then moved the court to dismiss the defendant's motion for a new trial on the ground that no brief of the testimony had been filed under the approval and revision of the court as required by law, which motion the court sustained and the defendant excepted.

The indorsement of the judge on the paper which purported to be a brief of the testimony, was no approval of it as contemplated by the forty-ninth rule of court, and the reason why it was not approved, and could not be, was owing to the *laches* of the defendant in not presenting it to the judge at an earlier period of time after the trial of the case. When parties lose their rights by their own negligence, this court has no legal power or authority to relieve them, even if it had the inclination to do so.

Let the judgment of the court below be affirmed.

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THE SOUTHERN EXPRESS COMPANY *vs.* LYNCH.

1. Where in bail-trover, by election of the plaintiff, the jury returned an alternative verdict for a specified amount of money, to be discharged by the delivery of property within twenty days, and the defendant failed to deliver it within such time, the verdict became absolute for money. Therefore, further imprisonment under the bail process would be for a debt, and hence unconstitutional.
2. Where a defendant in bail-trover, after the expiration of the time

ed by the alternative verdict against him for the delivery of property, moved the court—not by suing out a writ of *habeas corpus*, but by mere petition—to be discharged, and an order was thereupon passed discharging him, to which plaintiff excepted, the court should have granted a *supersedeas* to such order until the final determination of the question, taking such bond and prescribing terms as the nature of the case might require.

proper remedy for one who is illegally imprisoned, with or without any form of law, is by *habeas corpus*. We are not aware of any law or usage of our courts which, after final judgment, authorizes the superior court to discharge a person from imprisonment in any other proceeding.

Verdict. Constitutional law. *Supersedeas*.  
 Error in the Superior Court. *Habeas corpus*. Before  
 SNEAD. Richmond Superior Court. October  
 1879.

reported in the decision.

H. MILLER; J. S. & W. T. DAVIDSON, for plaintiff  
 or.

CLAY FOSTER, for defendant.

SON, Justice.

The defendant in error was sued by the Express Com-  
 pany in trover, to recover a package of money entrusted  
 to him as its agent, and bail was required under section  
 1000 *et seq.* of our Code, and failing to give security or  
 deliver the package sued for, he was committed to jail.  
 At the trial term of the cause, the plaintiff elected to take  
 an alternative verdict, which was rendered for the sum of  
 five thousand dollars, to be discharged on the delivery  
 of the package within twenty days from the date of  
 the verdict. The package was not delivered within  
 the time, and thereupon the defendant petitioned the  
 court during the same term, for his discharge, on the  
 ground that he was in prison for debt contrary to the



constitution of the state, which declares in the xxi paragraph of the first article thereof that "there shall be no imprisonment for debt in this state." The court discharged him from imprisonment, and the plaintiff excepted, making three points for our adjudication. First, that the defendant, under the facts made in the record, was not entitled to be discharged; secondly, that the plaintiff, on bringing the case to this court, was entitled to a *superse-deas* until the hearing here; and thirdly, that if entitled to his discharge at all the remedy is by writ of *habeas corpus*, and that the court on mere motion or petition did not have the legal authority or use the proper remedy to discharge the defendant.

1. Was the defendant imprisoned for a debt, when he was discharged? If so, he was entitled by the fundamental law of the state to his discharge from such imprisonment, for the reason that the fundamental law declares that nobody shall be held in prison for a debt.

Under section 3564 of the Code the plaintiff may say "whether he will accept an alternative verdict for the property or its value, or whether he will demand a verdict for the damages alone, or for the property alone, and its hire, if any; and it shall be the duty of the court to instruct the jury to render the verdict as the plaintiff may thus elect." The plaintiff elected the alternative verdict and got it; what did the plaintiff get? A property verdict; if the defendant saw fit to discharge it by a surrender of the package in twenty days he undoubtedly got; but at the end of twenty days what remained to the plaintiff? Unquestionably nothing but a verdict for twenty-five thousand dollars, or a debt for that sum in the form of a judgment for damages to that amount. Now, if the verdict had been for the package alone, we are clear that under the principle ruled in the case of *Harris vs. Bridges*, 57 Ga., 407, the verdict being for property alone, would not be a debt of any sort so as to come within the constitutional prohibition of imprisonment for debt; and

the judgment pronounced in that case by this court, defendant would not have been entitled to his discharge. For it would be absurd to hold a man by *mesne* in jail for the purpose of recovering from him his *property*, and then turn him out the moment judgment *for that property* had been obtained. Is such a principle would be to plant and grow the tree, its "fruits might turn to ashes on the lips."

This verdict is not for the property. It was not for the property—the package—after twenty days. The defendant could not pay the verdict after twenty days with the package. The judgment became a debt of record—adding on all his property for twenty-five thousand dollars and all he owned could be seized and sold to pay the order section 3079 of our Code, it would have a lien on this package, if ever found, so as to levy upon all other judgments or liens against the defendant; it would also have a lien on all the rest of the defendant's property from its date; and that lien could be satisfied and discharged by nothing short of the payment of ten per cent, principal and interest.

It is clear, then, that this verdict authorized a judgment following its terms, for that sum of money, and when entered, the verdict became a judgment for money, the highest form of debt known to the law.

This verdict was accepted by the company when it was to take it in that alternative form, by the express provision of section 3564 of the Code; for it was to say "whether he (would) will accept" such a verdict; and there it said that it would, and thereby it did. And defendant's right to be relieved from prison expired twenty days after the return of the verdict, when judgment was entered up thereon immediately because the verdict only gave him twenty days to pay with the package; after that time he could only pay with money—lawful money—just as any other debt. And whenever entered, the judgment could not be altered or change the verdict in any respect.

2. The next point made by the plaintiff below, and in error here, is, that it had the legal right to demand a writ of *supersedeas*, or an order to suspend the discharge of the defendant until the case could be reviewed by this court, and that the superior court should, on signing the bill of exceptions, have granted it such writ or order. If it had been a proceeding by *habeas corpus*, this court has held that the company, the plaintiff in error, would not be entitled to such a writ or order, 34 Ga., 101. But it was not a proceeding by writ of *habeas corpus*, which the judge of the superior court may grant to bring any prisoner before him, to inquire into the legality of his confinement, but a proceeding in court unauthorized. so far as we are informed, by any statute of this state, or by the statute law of England or its common-law in force here; and on a writ of error to such a judgment, why should not a *supersedeas* be predicated? It is true that there is no express provision by statute in regard to the terms on which it should be granted, what bond or oath would be required; but by section 247 of the Code, the judge of the superior court is empowered to grant the writ of *supersedeas*, just as he is the writs of *quo warranto*, *certiorari*, *mandamus*, etc., etc.; and by section 3639 "the judge of any superior court may frame and cause to be issued by the clerk, any writ of execution to carry into effect any lawful judgment or decree rendered in his court." And if it be said that the latter section applies particularly to final executory writs, yet by the third and sixth subdivisions of section 247, it will be seen that the powers of the judges are very comprehensive, and the general principle is that for every right a remedy may be framed. We hold, therefore, that the plaintiff in error was entitled to supersede the judgment on such terms and conditions as the court should prescribe. It offered bond and security for costs and any sum fixed by the court for damages which the defendant might sustain and recover.

3. We also hold that the remedy to discharge a person

legally in custody under any form of law or without as old as the foundations of English liberty. It is t of *habeas corpus*. The judges of the superior are empowered to grant the writ, and this is the whenever a person illegally deprived of liberty immediate discharge. We are not aware of any misage of our courts, which, after final judgment, makes the superior court, as a court, to discharge a from imprisonment by any other remedy than this t of *habeas corpus*, and then the judge sits as a *corpus* court and not as the superior court. That is complete, and it had better be adhered to. st therefore we are of the opinion that the defend- error was entitled to be discharged from prison he was confined there for a debt, we think that edly prescribed by law was not followed, and that gment should have been superseded until the cause ave been reviewed here, and therefore the judg- reversed. ment reversed.

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### SEIBELS vs. HODGES.

der of court is necessary to authorize the issuance of a *scire* to revive a dormant judgment. ten years have elapsed from the date of the judgment, and a. was issued, or if issued, no levy was made, and no steps as provided by law to revive the same, proceeding by *scire* is barred.

a demurrer is filed to pleadings, the court looks alone to the ising thereon, and pronounces its judgment without consider- y other matter or thing appearing *aliunde*. It does not ap- at after the order allowing the amendment the right of the ner was barred.

e it appears upon the face of the papers presented to the in a proceeding by *scire facias* to revive a judgment, that the al judgment was rendered in an appeal cause by the court



without the verdict of a jury, it is not error to dismiss the same upon the ground that it was illegal and void, and therefore could not be revived.

*Scire facias*. Statute of limitations. Judgments. Pleadings. Before Judge FLEMING. Bullock Superior Court. October Term, 1879.

Report unnecessary.

THOMAS H. POTTER, by E. M. HAMMOND, for plaintiff in error.

No appearance for defendant.

CRAWFORD, Justice.

A *scire facias* to revive a dormant judgment was sued out by the plaintiff in *fi. fa.* against S. R. Hodges, the defendant, who appeared and resisted the proceeding by a demurrer thereto because—

1. The *scire facias* had been issued without an order of court authorizing the same.

2. That more than ten years had elapsed from the time of the judgment to the filing of the petition for *scire facias*.

3. That more than ten years had elapsed from the date of the judgment to the service of the *scire facias* on the defendant.

Upon the filing of this demurrer and the facts appearing to be true—the plaintiff amended his petition by adding thereto the entry of a levy which appeared on the back of the execution and which bore date January 20th, 1869. Thereupon the defendant made answer further resisting plaintiff's right to revive, upon the ground that the original judgment was rendered by the judge upon an appeal without the verdict of a jury and therefore null and void.

After argument had the demurrer was sustained and

*scire facias* dismissed, to which judgment on the demurrer, and the dismissal of the suit, the plaintiff excepts. No order of court is necessary to authorize the issuance of a *scire facias* to revive a dormant judgment. *Code, §3607.*

Where ten years have elapsed from the date of the judgment and no *fi. fa.* has issued, or if issued no levy has been made, and no steps taken as provided by law to revive the same, it is barred.

Where a demurrer is filed to pleadings the court sustains the demurrer alone to the law arising thereon, and pronounces its judgment without considering any other matter or thing arising *aliunde*. It does not appear to us therefore, that the order of the court allowing the amendment of the plaintiff's petition of the sheriff's entry on the *fi. fa.* at the right of the petitioner was barred, and the law sustained by the demurrer was with the plaintiff, and so the demurrer should have been the ruling.

Where it appears upon the face of the papers presented to the court in a proceeding by *scire facias* to revive a judgment, that the original judgment was rendered in an illegal cause by the court without the verdict of a jury, it is no error to dismiss the same upon the ground that it is illegal and void, and therefore could not be revived. The record shows that this case was dismissed upon that ground and therefore the judgment is affirmed.

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#### FLEMING vs. HILL.

The evidence is sufficient to support the verdict. The questions to charge, not warranted by the evidence, are properly refused.

The defendant having bought goods from plaintiff, and the issue being whether they were to be paid for by himself or another, evidence is admissible in behalf of plaintiff to show that on the same day the defendant went into another store to buy such articles as those sued for to fill an order for parties with whom he was dealing, but was not paid for the same himself.

4. Interrogatories and answers were as follows :

Q. "State whether or not, at the time said account was contracted, you heard anything said between plaintiff and defendant about defendant being entitled to a part of the profits of said bill by reason of his having procured the order for the same on plaintiff? Was not defendant to have half of the profits?"

A. \* \* "The plaintiff stated to him (defendant) he did not know Morgan & Printup, and never had any dealings with them, and would look to the defendant for its payment. When collected, the defendant was to have half of the profits of the sale."

Q. "Did you hear anything said at the time as to who was to collect said bill, and for whom and from whom?"

A. "Witness' understanding and recollection of the conversation was that defendant was responsible for the collection of the bill, and was to deliver the money into the store without any express or other charges."

*Held*, that the answers do not vary sufficiently from the questions to cause their exclusion.

Verdict. Charge of Court. Evidence. Before Judge CLARK. City Court of Atlanta. June Term, 1879.

To the report contained in the decision it is only necessary to add that the following were among the grounds of the motion for new trial:

(1). Because the verdict was contrary to law and evidence.

(2). Because the court allowed the answers of Culberston to be read, as set out in the fourth head-note. Defendant objected to them as not responsive to the questions, and to the first part of the last answer as being an inference.

(3). Because the court refused to charge the following requests of defendant's counsel:

(a). "If the jury believe from the evidence that Morgan & Printup were liable to plaintiff, Hill, for the goods sent to them, any undertaking by defendant, Fleming, to guarantee the payment of said bill, or to become responsible for the collection of said bill, would be a collateral undertaking, and not binding on Fleming, unless it had been in writing."

the law leaves all who share in the guilt of an transaction where it finds them and will not lend enforce the contract.

jury believe, from the evidence, that the liquors, of which is sued for, were sold by plaintiff to for the purpose of enabling defendant (who license) to sell liquors at wholesale, to sell the Morgan & Printup, and the plaintiff knowingly m to do so, by charging the goods on plaintiff's Morgan & Printup, and shipping said goods to Printup, and making out the bill for the same & Printup, such a transaction would in viola- e revenue laws of the United States, and would nd plaintiff could not recover for the price of so sold."

ause the court, over the objection of defendant's a the ground of irrelevancy, permitted W. R. tify that defendant, on or about July the 15th, (date of the purchase involved in this suit) called use of Cox, Hill & Thompson, in Atlanta, and get their said house to fill a bill of liquors, y to about the same amount and character as on, that defendant said to witness he desired to rson to fill said bill who would allow defendant he most money on it; that defendant did not e name of the person for whom said bill was to and defendant proposed to be responsible for ent of it. Witness told defendant his house w him half of the profits, which was five per at defendant left and said he would return if he do better at some other place.

ROYLES, for plaintiff in error.

TS & GLENN, for defendant.

D, Justice.

as a suit upon an open account, bruoght by John



M. Hill against A. H. Fleming, with two verdicts for the plaintiff, and now for the second time before this court. The defendant, by his pleas, first, denied the contract as alleged; second, that if he made it, he did it with the intention of re-selling the liquors bought to the firm of Morgan & Printup, and having no license to sell, he was aided by the plaintiff in contriving to make the sale for the purpose of defrauding the government of its revenue, and therefore the contract was void; third, that if he was liable at all, it was a collateral liability to that of Morgan & Printup, and not being in writing, it was not binding upon him. The issues thus presented were found against him by the jury, and he sought a new trial on account of the errors alleged to have been committed by the court and jury, which was refused and he excepted.

1. The questions of fact before the jury were, first, to whom were the goods sold, to Fleming the defendant, or were they sold to Morgan & Printup? Second, if sold to Fleming, was there any intention to re-sell them by a new contract to Morgan & Printup in such way as to defraud the government of its revenue, and was he aided in that intention by the plaintiff? and third, was the contract with the plaintiff an original or collateral undertaking to pay for the goods sold?

The testimony of the plaintiff Hill, believed by the jury, was quite sufficient for them to have found that the goods sold were sold to the defendant himself, and not to the firm of Morgan & Printup; or if upon the other hand they had disbelieved Hill, and chosen to have believed the defendant, Fleming, then his testimony was also sufficient to have authorized their finding that the sale was one to Morgan & Printup and not to Fleming. The entry on the books of the plaintiff, the shipment of the goods direct to those parties, as well as everything which transpired, was but evidence to ascertain where the truth lay as to the real contract. Charging the goods on the books of the plaintiff to Morgan & Printup was *prima facie* evidence in favor of the defendant, but it was not conclusive, the

could explain and rebut, and if the jury believed in they could so find.

real question being whether the sale was made to , or to Morgan & Printup, if to him he was liable, m he was not, unless his agreement to pay had writing. So the finding of the jury on the first necessarily disposed of the last.

on the second plea, under the proof submitted, ound by the jury, it simply shows a purchase by with a delivery to Morgan & Printup, and is, in one sale, and that to Fleming, with directions to goods to the other parties to whom he had agreed er them. The plea set up could not be sustained proof, nor was the charge asked for authorized by e; the refusal of the court to give it, therefore, error.

the request to charge on the collateral liability ing upon a promise to pay the bill for Morgan up, there was no claim by Hill that any such was ever made to him, none by Fleming that he r made such promise, and none by any other witness had, so that, to have charged the jury as requested, ave been putting to them matter not in the proof, refore would have been error.

another ground of complaint in the motion for a al was the admission of the testimony of W. R. er the objection of defendant's counsel. The issue first plea was whether the defendant bought the himself on his own account, or whether he bought r Morgan & Printup. This testimony was offered y that on the same day the defendant went into e of witness to buy such articles as were sold, to rder for parties with whom he was dealing, but pay for the same himself. This testimony em- the facts that he wanted to buy such goods as were the plaintiff, that it was on the same day, and was n order, which he wanted to fill by the house that

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*Coston vs. Dudley, executor, et al.*

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would allow him to make the greatest profit, and for which he was to pay himself. This testimony supported the plaintiff's theory of the case and was admissible.

4. The objections to the answers of the witness, Culberson, are not entirely without merit, but are not sufficient, in our judgment, to have excluded them. In looking through the whole case, we think that it was fairly submitted to the jury, and that their verdict having sufficient proof to authorize it, we will not disturb their finding.

Judgment affirmed.

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COSTON vs. DUDLEY, executor, *et al.*

1. A decree in equity cannot be set aside on motion, but the objection to the remedy may be waived; and if a motion made to set aside a decree be argued without objection and granted, it is then too late to raise the question as to the propriety of the remedy by motion.
2. A final decree cannot be entered on a bill as confessed until the complainant, or his solicitor in his absence, shall have sworn that the facts charged are true, or, according to his information and belief, must have been admitted to be true by the defendant in an honest answer.

Practice in the Superior Court. Equity. Decree. Motion. Waiver. Judgments. Before Judge JOHNSON. Washington Superior Court. September Term, 1879.

In this case the recollection of the counsel and that of the court seems to differ somewhat, and the statements of the bill of exceptions are materially qualified by the judge's note appended thereto. As thus qualified, the facts appear to be as follows: Coston filed his bill against Dudley, executor, and Coston, in Washington superior court. At the March term, 1879, an order was passed which recited that no answer had been filed and provided that if no sufficient excuse should be rendered for the

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*Coston vs. Dudley, executor, et al.*

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of defendants at the next term of the court, the bill should be taken as confessed so the complainant (or his solicitor in his absence, swear that the same were true, or according to his opinion and belief must have been admitted to be true by the defendants in an honest answer. At the next term, 1879, the case was called. Dudley was present and stated that he did not propose to litigate the case, and cared nothing for it. From subsequent reports of counsel, it appears that one of defendants' counsel (Mr. Langmade) was also present, and asked the court for complainant to have the case continued, but the latter refused. Counsel for complainant informed the chancellor that the bill had been taken as confessed at the previous term of court, and was thereupon ordered to take a verdict and decree. Subsequently defendants moved to set aside the decree, among other grounds because no affidavit had been made as a foundation for taking the bill as confessed. The motion was granted without objection to it as the proper remedy, and the decree was set aside. Complainant excepted.

JOHN L. RODGERS, for plaintiff in error.

W. H. LANGMADE; B. D. EVANS, for defendants.

C. J. ROBERTS, Chief Justice.

There was a motion to set aside a decree in an equity case on the grounds therein stated, which was granted by the court on the ground that a decree *pro confesso* had been taken in the cause as required by the 4208th section of the Code, whereupon the complainant excepted.

It is insisted here that a decree in equity cannot be set aside on motion as was ruled by this court in *Brown v. Nett*, 55 Ga., 189. We adhere to the ruling of the court in that case, and if the complainant had

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Dozier *vs.* Allen

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moved to dismiss defendants' motion in this case and the court had overruled it, we should have held it to be error. But according to the judge's certificate, there was no motion to dismiss the defendants' motion to set aside the decree because that was not the appropriate remedy, and the complainant appears to have *waived* all objections to the remedy adopted by the defendants, by joining issue with them and discussing the merits of the motion to set aside the decree without objecting to the remedy, and it was too late to raise that question after he had taken his chances and the decision of the court was against him upon the merits of the case. As to the right of the complainant to waive the remedy, see Code, section 10.

2. In view of the facts of this case as certified by the presiding judge, we affirm the judgment of the court below.

Judgment affirmed.

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DOZIER *vs.* ALLEN.

Where the justice of a district in which the defendant resided was disqualified, and suit was brought and the case tried upon its merits, without objection, in another district, the presiding justice of which had jurisdiction of the subject matter, the defendant thereby waived objection to the jurisdiction of his person, and the judgment for the plaintiff was good as against him.

Jurisdiction. Waiver. Justice Courts. Before Judge CRISP. Schley Superior Court. October Term, 1879.

Reported in the decision.

W. A. HAWKINS; JOHN SCARBOROUGH, for plaintiff in error.

B. B. HINTON; W. H. MCCRARY, for defendant.

NER, Chief Justice.

is was a *certiorari* from a justice court, which, upon hearing thereof in the superior court, was dismissed, the plaintiff therein excepted. The only question presented on here was, whether the justice who rendered judgment had jurisdiction to do so on the following statement of facts: The only justice in the defendant's district was his son, who was disqualified. The defendant was therefore sued before a justice in an adjoining district, and the case was tried there without any objection to the jurisdiction, the defendant consenting thereto. The 445th section of the Code declares that "when a justice of the peace is disqualified from presiding, and there is no other justice of the peace in his district who is qualified, any justice of the peace of the county is authorized to issue all process and to preside in his district; and if a justice of the peace is sued under such circumstances, the suit may be located in any adjoining district." It was insisted in view of the provisions of this section of the Code, that Cleghorn, the justice of the adjoining district before whom the case was tried, had no jurisdiction under the law to hear and determine the same, and that the judgment was void. By the 446th section of the Code, justices of the peace have a general and original jurisdiction in all civil cases where the principal sum claimed does not exceed one hundred dollars. The amount sued was for \$24.25, so that justice Cleghorn had jurisdiction of the subject-matter of the suit under the law, and although he did not have jurisdiction of the defendant's person in his district, yet that was a personal privilege of the defendant had the right to waive so far as he individually concerned, but not as to the rights of other persons. 14 *Ga.*, 589. The judgment was therefore affirmed and judgment so far as the defendant himself was concerned, and there was no error in dismissing the *certiorari*. The judgment of the court below be affirmed.

## THE STATE OF GEORGIA vs. JETER.

Where a levy has been made and claim interposed, it requires an order of court for the sheriff to withdraw the *fi. fa.* from the claim papers and make a new levy. Without this the new levy is not legal; nor is it rendered legal by the fact that the first levy was illegal, and was afterwards held to be so.

Sheriffs. Levy and sale. Practice in the Superior Courts. Before Judge WRIGHT. Decatur Superior Court. November Term, 1879.

Reported in the decision.

BOWER & CRAWFORD, by brief, for plaintiff in error.

FLEMING & RUSSELL; O. G. GURLEY; JOHN E. DONALDSON, for defendant.

JACKSON, Justice.

This was an issue between the defendant Jeter, and the state, under sections 2028 and 2029 of the Code in respect to the liability of defendant's homestead to pay the *fi. fa.* issued by the comptroller-general against the tax collector of Decatur county, and defendant as one of his sureties. The defendant moved to dismiss the levy on the ground that when it was made there was an undisposed of levy and claim interposed, and no order of the court was passed allowing the execution to be withdrawn from the claim papers to make the new levy. The state replied that the former levy was void, and was afterwards so held because the sheriff who made it was a co-defendant and interested in the case. The court dismissed the levy, and error is assigned on that judgment.

In 19 Ga., 161, this court held that it required an order in such cases to withdraw the execution and make a valid levy. Is the reply that the first levy was illegal and void,



undoubtedly was, the sheriff being interested, sufficient to dispense with the leave of the court to withdraw execution? We are not prepared to say that it is. It would give the sheriff the right to withdraw claim papers without trial to try cases pending in court, whenever he thought the levy illegal, and therefore the claim good. The law had better be held to the plain rule that in such cases the court should control the papers, and on a proper showing should have power to grant the withdrawal. Judgment affirmed.

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TARPLEY vs. CORPUTT.

Under the constitution of 1877, justice courts must be held at stated times and places in the districts, and that whether held by the justice or by the notary public. Where a plaintiff brings two actions on account against the same defendant to the same term of a justice court, and the defense is the same in each, or none is filed, the cases should be consolidated by motion if the aggregate amount does not exceed the jurisdiction of the court.

Justice Courts. Constitutional law. Before Judge  
HON. Laurens Superior Court. . October Term,

Corputt began two actions on account in the justice court of the 342d district, G. M., of Laurens county, before Judge P. Robinson, a commissioned notary public of that county, against Tarpley. The actions were brought to court on fourth Tuesday in July, 1879, and on that day judgments were rendered against defendant. Defendant appeared in court and filed his plea to the actions, alleging that said court could not legally and constitutionally sit on said fourth Tuesday, because there had never been one sitting of said court in said district on the second Tuesday, and that said court had not been



adjourned from the second to the fourth Tuesday, but had been adjourned from said second Tuesday in July to the second Tuesday in August, the next succeeding term, and all the business therein was finished.

The court overruled defendant's plea. Defendant then moved to consolidate the two said cases, as both of them did not reach the sum of fifty dollars, and both were accounts, and between the same parties. The court overruled defendant's motion and rendered separate judgments, with cost. Defendant sued out a *certiorari*, alleging error in both these rulings.

On the hearing there was no controversy about the facts. It was admitted that the justice of the peace in that district held his court on the second Tuesday in each month, while the notary and ex-officio justice had appointed the fourth Tuesday. The court dismissed the *certiorari*, and defendant excepted.

ROLLIN A. STANLEY, by brief, for plaintiff in error.

No appearance for defendant.

JACKSON, Justice.

This *certiorari* makes two points: first, that the court held by a notary public on the fourth Tuesday of the month when the case was tried was no legal court, because the justice court for that district had been already held that month on the second Tuesday at the regular time and place by the justice of the peace for that district; and secondly, that the notary public, acting as justice of the peace and holding the court, refused to consolidate two actions of account brought at the same time and involving the same issue, and when consolidated were within the jurisdiction of the court.

The superior court held that the notary was right, and dismissed the *certiorari*.

We think that the court was wrong on both points—certainly on the last.

before the constitution of 1868, but one justice court was held in a district, and at but one place. That constitution gave justices of the peace the right to sit at the place they pleased for the trial of cases. Code, §5104. The constitution of 1877 declares that they "shall sit at fixed times and places." Notaries public, not more than one for each district, may be appointed, and are *ex-officio* justices of the peace." Sup. to Code, §34.

It is not provided in the constitution that notaries public sit at all, as a court, but an act was passed at the session of 1879 enabling them to hold court monthly, and at fixed times and places. Under the constitution of 1877 there can be but two magistrates authorized to act as justices of the peace in one district; the one a justice of the peace *eo nomine*, the other a justice of the peace *ex-officio*—by virtue of office as notary. So under the old system there were two justices of the peace in each district, and they heard cases separately and kept separate dockets, but the court was held at one time and at one place and both sat at that time and place. It seems to be the intention of the framers of the constitution of 1877 to restore the old order of things, and to have but one justice court in each district, so far as time and place are concerned.

Clearly the defendant had the right to have the two cases consolidated, both cases being on accounts and sued at the same time and on trial at the same place and before the same notary, and the defense being the same—that is, being no defense to either on the real merits—and the defendant's request to segregate sum not ousting the jurisdiction.

In *Ga.*, 201, it is ruled "that where the plaintiff has different suits upon separate and distinct notes and demands which are all due and may be joined in the same action, and defendant or his counsel shall make a general demurrer, it is not necessary for the plaintiff to aver that the defense to all the notes or demands is the same, or that there is no de-

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Franklin vs. Kaufman et al.

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fense to them, then the plaintiff may be compelled to consolidate them into one action for the purpose of avoiding unnecessary costs to the defendant." And in 45 Ga., 96 the principle is applied to justice courts in these words: "Where two actions are brought by the same plaintiff against the same defendant in a magistrate's court, at the same term, on several promissory notes given for the same consideration at the same time and payable to the plaintiff, the defendant is entitled to have them consolidated, provided that when consolidated the aggregate amount does not oust the court of jurisdiction." That principle controls this case, and covers it exactly, except that here the suit is on accounts and there it was on notes.

That can make no difference. Let this matter rest in the discretion of the justice court, where the superior court put it, and cases never would be consolidated, because the justice's interest to increase his own costs would impel him to deny the motion. It is wiser to force him to consolidate and save defendants the costs.

Judgment reversed.

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FRANKLIN vs. KAUFMAN et al.

1. Where the answer to a *certiorari* fails to reply specifically to the allegations in the petition, to entitle the excepting party to a fuller response, he must specify in writing the defects and give notice to his opponent.
2. A justice of the peace must be one of the persons presiding at a constable's election, if there is one in commission to be had who is not a candidate. Where such officer acted for but a portion of the day, the election was rendered illegal.
3. Whenever there is a failure to elect from any cause, either that the election is illegal or there is no candidate, or if the election be legal and there is a candidate, if he fails to qualify and give bond, then, in legal contemplation, there is a vacancy, and it is the duty of the magistrates to appoint. The county commissioners have no authority to order a new election.

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Franklin vs. Kaufman et al.

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*certiorari*. Justice of the Peace. Constable. Election matters. Office. Before Judge FLEMING. Supreme Court. May Term, 1879.

supported in the opinion.

P. & S. B. ADAMS, for plaintiff in error.

A. ABRAMS, by brief, for defendants.

FORDE, Justice.

In a constable's election for the third militia district of Franklin county, the parties to this suit were the candidates, Kaufman and Endres receiving the largest number of votes, the election was contested before the county commissioners who were empowered to issue the certificate of election. The commissioners, after hearing the case, decided that the election was legal and valid and that Kaufman and Endres were elected. Franklin, defendant, sued out a writ of *certiorari* and carried the case to the superior court, alleging that the court committed error in holding that the election was legal and valid and in not declaring otherwise and ordering a new election.

Exceptions were filed to the answer of the commissioners to the petition for *certiorari*, which were overruled by the court and the plaintiff excepted. Upon the hearing of the *certiorari* itself, upon the grounds of complaint in the answer, it was sustained, the decision of the commissioners reversed, the election declared illegal, that no authority existed and that the power to appoint was in the magistrates of the district. The plaintiff in error excepted to so much of the judgment as ruled that a vacancy existed and that the magistrates had the power to fill it.

We have in this case but two questions made for our consideration, the first is, was the judge right in overruling the

exceptions to the answer of the commissioners, which was that it did not specifically reply to the allegations made in the petition for *certiorari*. The law is clear and positive that this shall be done by the officers of the lower judicatory, and it is equally clear and positive that where it is not done, in order to entitle the excepting party to avail himself of a fuller and more perfect response to the allegations set out, he must comply with the law as defined in §4062 of the Code, which declares that exceptions to the answer shall be filed in writing *specifying the defects* and notice thereof given to the opposite party. In this case the defects were not specified, and the ruling of the court thereon was therefore not erroneous.

2. The second question is, was the election illegal and did a vacancy exist? The law is mandatory that at such elections, "A justice of the peace must be one of the persons presiding at a constable's election, if there is one in commission to be had and he is not a candidate at the same election." See Code, §1328.

There is no dispute as to the fact that a magistrate who was himself not a candidate, was to have been had, and indeed was had for half the day, and then refused to preside any longer. To have made the election legal, this officer should have continued in the performance of the duty assumed, until the same was fully discharged, and his failure to do so necessarily invalidated the election, none other being present who was qualified to relieve him.

3. This being the fact, was there a vacancy in the constables' office for that district? We think that that which constitutes a vacancy in this state is defined by statute in §465 of the Code, and which also further provides how it shall be filled.

"Vacancies are filled by appointment of the justices of the peace of the district in the following contingencies :

When from any cause, there is a failure to elect, and give bond at the regular time." It is only the first of several contingencies named, sufficient in our judgment to show, that whenever there is a failure to elect from any cause, either that the election is illegal, that there is no candidate, or if the election is legal and there is a candidate, if he fail to qualify and give bond, then in legal contemplation there is a failure to elect and it is the duty of the magistrates to appoint. This was made one of the grounds of error in the case, as stated by the commissioners court, that they did not order a new election to be held, and in view thereof the court in sustaining the *certiorari*, could not do more or less in this branch of the case than to rule as he did, in deciding that there was no election, that it was the duty of the magistrates to appoint, there being no authority in such cases for a new election. Judgment affirmed.

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#### WESTERN AND ATLANTIC RAILROAD *vs.* STEADLY.

In proof that a cow had been killed by a railroad train, the presumption of negligence arose against the company, and in the absence of sufficient evidence to rebut such presumption, a verdict for the plaintiff was right.

One of the jurors who tried a case in a justice court was a colored man, and that his name was not on the jury list or in the jury book was not good ground for sustaining a *certiorari* to the finding of the justice court.

Railroads. Negligence. Presumptions. Jurors. *Certi-*  
Before Judge MCCUTCHEN. Catoosa Superior  
August Term, 1879.

Steadly sued the Western & Atlantic railroad for twenty thousand dollars damages for killing his cow. On the trial in the justice court where the suit was brought, plaintiff showed

that defendant's train had killed his cow within fifteen or twenty feet of a public road crossing; that the train was running at its usual rate of about fifteen miles an hour, and that it did not slacken its pace. The value of the cow was also shown.

The evidence for defendant was to the effect that the whistle was blown before reaching the crossing; that the cow came upon the track only about thirty yards in front of the engine, when it was too late to slacken speed; that the accident was unavoidable.

The jury before whom the case was tried in the justice court found for the plaintiff \$16.00. Defendant carried the case up by *certiorari*, alleging that the verdict was contrary to law and the evidence, and that one of the jurors who was summoned as a talesman, was not qualified to serve, his name not being on the jury list or in the jury box, which fact was not known to defendant at the time of trial.

The *certiorari* was overruled and defendant excepted.

W. H. PAYNE; JOHNSON & MCCAMY, for plaintiff in error.

J. C. CLEMENTS; I. E. SHUMATE, for defendant.

WARNER, Chief Justice.

This case came before the court below on a *certiorari* from a justice court, and upon the hearing thereof the court overruled the same. Whereupon the plaintiff in *certiorari* excepted.

It appears from the record that the plaintiff in the justice court sued the defendant for killing his cow by its railroad train, within fifteen or twenty feet of a public road crossing. There is no dispute, from the evidence, that the cow was killed by defendant's train, nor as to the fact that the whistle of its locomotive was not blown and its train checked in its speed as required by the 708th section of the Code, and the presumption being

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 Lanier vs. Cox et al.
 

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the company as provided by the 3033d section, no error in overruling the *certiorari* in view of the error contained in the record, nor in regard to the competency of the juror, James. 19th Ga., 614. The judgment of the court below be affirmed.

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 LANIER vs. COX et al.

A borrower, in 1876, received from a lender \$150.00, but paid for \$172.00 with twelve per cent. interest, this was in violation of the reservation of more than legal interest, and wrought a forfeiture under the act of 1875.

Under the usury act of 1875, the penalty for taking more than legal interest was a forfeiture of the interest and the excess of interest. If already been paid it could be recovered by suit, or by way of set-off against a suit for the principal, within the time allowed by the act, but in either event—whether payment had been made of only interest (both legal and usurious) was forfeited, and the lender had a right to recover the principal actually loaned.

In the case the jury found for the plaintiff; the court granted a verdict unless he would write off not only the interest (both legal and usurious), but also a part of the principal. The judgment is affirmed with directions that the verdict stand if the plaintiff will give up all but the principal.

USURY AND CONTRACTS. Promissory notes. Judgment of Judge McCUTCHEN. Whitfield Superior Court. Term, 1879.

The plaintiff sued Cox et al. in a justice court on two promissory notes, each dated October the 18th, 1876, due six months after date to one Treadwell or bearer, aggregating \$1000 with interest specified at twelve per cent., made by two defendants, and indorsed by another (Treadwell). The defendants pleaded the general issue and usury. The justice rendered judgment for the plaintiff, and the plaintiff appealed, and the cases were consolidated. On appeal in the superior court, it appeared that Lanier



received the notes directly from Cox, and paid to him \$150.00 for them. The jury found for plaintiff. Defendants moved for a new trial on the ground that the verdict was contrary to law and evidence. On the argument, counsel for plaintiff asked the court to fix a sum which should be written off and the balance allowed to stand. The court announced that, under his view, plaintiff had forfeited all interest (legal and illegal), and could set-off against the principal such interest and excess of interest as had accrued within a year. The counsel for plaintiff declined to write the amount below \$150.00, whereupon the court granted a new trial, and plaintiff excepted.

T. R. JONES, for plaintiff in error.

W. C. GLENN: I. E. SHUMATE, for defendants.

JACKSON, Justice.

This was a suit in a justice court, which was carried by appeal to the superior court, where the jury rendered a verdict for the plaintiff. A motion was made for a new trial, which was granted, and the plaintiff excepted. The court granted the new trial unless the plaintiff would write off, not only the excess of legal interest together with the legal interest, but a considerable part of the principal which was loaned, and which the defendant received from the plaintiff.

There can be no reasonable doubt but that interest beyond twelve *per centum* was exacted in this case, and by a contrivance between the borrower and lender this arrangement was attempted to be covered up. The act of 1875—see acts of 1875, p. 105, Supp. to Code, sections 368 *et seq.*—declares that interest beyond twelve *per centum* shall not be "reserved, charged or taken," "either directly or indirectly, by way of commissions for advances, discount, exchange, or by any contract or contrivance or device whatever." The court below decided

fourth section of the act is, "that no contrivance or management between parties to any such unlawful transaction, or their privies, shall have the effect to discharge such forfeiture, except it be *an actual and full payment of the amount so forfeited.*" What is the amount so forfeited? The answer is the same—only the interest—principal of the interest, legal and illegal, but no principal part thereof.

tion fifth enacts "that any plea or suit for the  
of such forfeiture, shall not be barred by the  
time shorter than one year." Still it is seen that  
eiture is the same, and when the interest has been  
paid, that can be recovered if it has not been  
re than twelve months prior to a suit therefor or a  
set-off to an action brought on the note; but no  
the principal can be recovered if paid, by suit, but  
erest, and nothing can be set off but interest. We

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Wakefield vs. Moore, sheriff, et al.

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think, therefore, that the meaning of this act on this point is clear. The plaintiff may recover the money loaned—actually paid the borrower—but no interest; the defendant, if within twelve months he has paid the plaintiff interest, may set that off against the principal loaned, and thus get it back; but if he has failed to sue for it, if not sued himself, or to set it off if sued, and has allowed twelve months to elapse after paying it, without some effort to recover it back, then he can never recover it at all, but loses it forever. For instance, usurious interest has been paid year by year for five years by A to B, and B sues for the principal loaned; then A can set off all the interest he has paid during the twelve months next ensuing the payment, but he is barred from setting off that which he paid during the other four years, or that which he paid over twelve months before he puts in his plea.

The judgment granting the new trial is therefore affirmed, but it is ordered that the verdict stand, if the plaintiff will write off all but the principal sum loaned, which, as the two suits were tried together in the superior court, we understand, amounts to one hundred and fifty dollars.

Judgment affirmed.

WAKEFIELD vs. MOORE, sheriff, et al.

1. Sheriffs are liable to plaintiffs in *fi. fa.* for any injury sustained by reason of a failure to discharge their duty in reference to the proper execution and return of final process, when placed in their hands. Plaintiffs in *fi. fa.* have a remedy by action on the case or by rule, the measure of liability in either case being the actual injury sustained.
- (a). While, in the present instance, we would not have opened the case and set aside the rule absolute on account of the discovery by the sheriff that the property levied on did not belong to defendant in *fi. fa.*, because, by proper diligence, this might have been discovered before rule absolute, yet we will not disturb the judgment of the court below in exercising its clear legal right so to do.

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Wakefield vs. Moore, sheriff, *et al.*

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absolute against a sheriff is not final and conclusive like a judgment between parties litigant. It is the dealing of the court with a defaulting officer, for whose neglect of duty he is required to answer to the plaintiff *in fi. fa.* the amount of his actual injury. The court may renew and annul its order absolute against a sheriff at any time before or at a subsequent term, upon motion, when it is made clear that he was not in contempt.

*fi. fa.* Damages. Judgment. Practice in the Superior Court. Before Judge POTTLE. Hancock Superior Court, October Term, 1879.

ordered in the decision.

JORDAN, by brief, for plaintiff in error.

ARN REESE, by brief, for defendants.

RD, Justice.

The order absolute having been granted by the judge against the sheriff for his failure to make the money due *in fi. fa.* which had been placed in his hands, he, on the day on which the money was ordered to be paid, moved for a motion to set aside and rescind the order absolute on the ground, among others, that the property upon which the money was levied was not the property of the defendant in error, and that the knowledge of that fact had not been brought to him until after the decision of the court was rendered. The rule. When this motion came on to be heard the plaintiff *in fi. fa.* demurred thereto; the court overruled the demurrer; the grounds set up in the motion were, by consent, accepted as the answer of the plaintiff to the original rule, and the traverse thereof was taken by the jury who found the issue in favor of the sheriff. Subsequent motions were filed *pendente lite* to the ruling of the court on the demurrer made to the motion to annul and set aside the order absolute, and that is the single question now presented to the record.

1. Sheriffs are liable to plaintiffs in *fi. fa.* for any injury which they may have sustained by reason of their failure to discharge their duty in reference to the proper execution and return of final process when placed in their hands. This liability may be fixed by an action on the case, or by a rule against them for contempt of the court, and in either remedy the measure of the liability is *the actual injury* which the plaintiff has sustained.

We concur fully with the judge below in making the order absolute against the sheriff under the testimony submitted; but we would not have opened the case to annul and rescind the rule, by hearing a new defense which by proper diligence he might have known and availed himself of before the decision had been rendered; this however being a right clearly vested in the judge of the superior court by law, we will not disturb his judgment thereon.

2. Such judgments are not final and conclusive as are those rendered between parties litigant; they are but the dealings of the court with one of its defaulting officers, and for whose neglect of duty, is ordered to pay over to the plaintiff in *fi. fa.* the amount of his actual injury. This being the character of the proceeding, the court may review and annul its order absolute against a sheriff at the same or at a subsequent term upon motion, when it is made to appear that he was not in contempt. This principle was ruled as early as the 2nd Georgia Reports, and may be found in the case of *Chipman vs. Barrow*, page 220. It was reaffirmed in the case of *Davis vs. Dempsey*, 15 Ga., 182, where it was held that there was no question but that the court had power to grant the motion. And so too in 50 Ga., 335, it was held that orders absolute do not operate as estoppels, but the court upon a proper case made will go behind the order and look into the truth of the case and in its discretion re-examine the same.

It was contended by the plaintiff in error that these cases were opened upon the ground of fraud; it is true

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Bateman *et ux.* vs. Archer.

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in the two last, to have made the sheriff liable would  
 been a fraud upon him, say the court, but the princi-  
 as ruled broadly and independently of the fraud,  
 ing the case of *Chipman vs. Barrow*, where there  
 o question of fraud made.

se questions of contempt in failing to execute the  
 s of the court, must rest in the sound discretion of  
 dge, and unless exercised arbitrarily or illegally,  
 d not be disturbed.

gment affirmed.

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BATEMAN *et ux.* vs. ARCHER.

e a debtor executed to his creditor an absolute deed to land,  
 from him an agreement in writing to relinquish all claim there-  
 he payment at a specified time of a certain sum of money,  
 his agreement was canceled and renewed from year to year  
 a time the payment should have been made by the debtor, a  
 equity by the creditor, recognizing the deed as an equitable  
 age, and praying that upon the failure of the defendant to pay  
 amount due, that his equity of redemption be forever barred  
 reclosed, was not demurrable upon the ground that the com-  
 at had an ample common law remedy. The contracts to re-  
 sh by the creditor, being executed at different times from the  
 were not such defeasances as would constitute it a mortgage  
 could be foreclosed at law.

money to secure which the deed was executed having been bor-  
 by the debtor to purchase the very land thereby conveyed,  
 was certainly abundant equity in the bill. The debtor cannot  
 both the money and the land.

ty. Mortgage. Debtor and creditor. Before  
 JOHNSON. Washington Superior Court. Septem-  
 rm, 1879.

orted in the decision.

ES K. HINES; C. C. BROWN, by Z. D. HARRISON,  
 intiffs in error.

B. D. EVANS, for defendant.

CRAWFORD, Justice.

The record shows that William Archer loaned to G. W. Bateman and his wife \$1200.00 on the thirteenth day of December, 1869, and took as security therefor a deed to 302½ acres of land; it also appears that he agreed in writing, December 15th, 1869, and entered the agreement on the back of said deed, that if the said Bateman would pay him on the twenty-fifth day of December, 1870, \$1392.00 he would relinquish all claim to the land to the said Bateman and wife. This agreement was canceled on the day for the payment of the money, and another of like character made, but no money being paid it was repeated from year to year until February 12th, 1875.

It also appears that on the first day of February, 1870, he loaned to Bateman the further sum of \$400.00, and took a deed to 218½ acres of other land to secure its payment, upon which deed there was an indorsement similar to that upon the first mentioned deed, except that it was for the sum of \$538.00, to be paid on the twenty-fifth day of December, 1871, and if paid he was to relinquish all his claim to the land so conveyed. The money not being paid at the time named a cancellation of that agreement followed, and a renewal thereof for another year was made, and thus from year to year it too was continued to February 12th, 1875.

On this date another written agreement covering both loans and both tracts of land was entered into, whereby if the said Bateman should pay on the twenty-fifth day of December, 1875, certain amounts specified in the contract, that then the said Archer was to relinquish all claims to the land which had been so conveyed.

No payment was made on this last mentioned date, and the said Archer recognizing his deeds under the contract as being nothing more than equitable mortgages, filed his



equity, setting up the foregoing facts and praying upon the failure of the defendants to pay the amount due upon the same, that their equity of redemption be forever barred and foreclosed.

In this bill the defendants filed a general demurrer, on the grounds that the complainant had an ample remedy at law, and that there was no equity in the bill. The judge overruled the demurrer, and this decision was assigned as error.

We do not see that the complainant did have an adequate common law remedy; these deeds were absolute and unconditional, and expressed the consideration of \$1,000.00 in one and \$400.00 in the other, and the bill alleged that there were written agreements made as hereinafore stated, but the two papers, when taken together, do not constitute legal mortgages; the contracts to relinquish were at different times entered into, possibly affected by different laws, and hence a court of equity was a proper tribunal to pronounce upon such contracts and construe them in their tenor and effect. *At law*, to make such papers mortgages, and to require the contract to reconvey to make it a defeasance, could not be executed simultaneously with the conveyance, as a part of the same transaction, and must be under a separate bill. *In equity*, written or parol evidence which clearly shows that the conveyance was intended but as a security, will make the transaction a mortgage. Jones on Mort., § 1018. A court of law being unable to foreclose a mortgage on account of some informality necessary to constitute it such, the same will nevertheless be regarded as an equitable mortgage, and the bill will be enforced by proceedings in equity. Jones on Mort., § 168.

That there is equity in this bill we can entertain no doubt. By this demurrer the defendants admit that they received \$1,200.00 in gold on the thirteenth day of December, 1869, with which to pay for this identical land which they have lived ever since, failing and refus-



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Philips, administratrix, *vs.* Crews *et al.*

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ing to pay, notwithstanding their promises and agreements to do so from year to year. And they further admit that they received \$400.00 more in gold and silver on the first day of February, 1870, with which to pay for the second piece of land conveyed to the complainant, and although promising from year to year to pay the same, have failed and refused to comply therewith, thus retaining the use of the money and the possession of the land. They should pay what is legally due on the deeds, or else they should surrender the land; equity will not allow them to keep both. In the language of Justice BLECKLEY, 60th *Ga.*, 590, "Equity says, do equity and have equity. It says redeem—pay the debt, do what you promised, comply with your contract, and then, but not till then, will you be restored to the ownership of the land. And this is right, and right eternal. It will endure forever. It is imperishable and everlasting." The principle of equity herein so strongly and eloquently enunciated we re-affirm, and see no reason why it should not be "imperishable and everlasting."

We would not be misunderstood; that redemption to which we refer is the exact sum for which the grantors are legally liable, which, if found upon the trial as charged in the bill, would be the original principal with only the lawful rate of interest thereon to the day of payment.

The demurrer therefore being properly overruled on both grounds, the judgment is affirmed.

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PHILIPS, administratrix, *vs.* CREWS *et al.*

1. Where the remainder-men brought suit against the administratrix of the life tenant for \$600.00, alleging his receipt thereof, his life estate therein, his death, and her refusal to pay, and the evidence sustained the averments of the declaration, a motion for non-suit was properly overruled.
2. A life estate in money, with remainder over, may be created. Money may be lost, but it should not be destroyed in the use.

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Philips, administratrix, vs. Crews *et al.*

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being no ambiguity or uncertainty in the provisions of a will, construction is for the court, and not for the jury. All parts are to be taken together and given effect. If this cannot be because of a conflict in the different parts, then the last must

uit. Estates. Pleadings. Remainder. Practice Superior Court. Wills. Before Judge CRAWFORD. Second Term Superior Court. November Term, 1879.

ted in the decision.

S. M. RUSSELL; PEABODY & BRANNON, for plaintiff.  
error.

DFORD & GARRARD, for defendants.

RD, Justice.

Anna Davie died leaving a will, by the third item she gave to her son, P. J. Philips, two \$1,000.00 of the M. & G. Railroad, one \$1,000.00 of the city of as, and money enough to make them of par value. In the sixth item it is declared "That portion of my estate which I have given to my son, Pleasant J. Philips, and to him alone, which he is to have, hold and without let or hindrance for and during his natural life, if he dies without issue, child or children, at his death it is to be equally divided between his surviving issue and the children of my three deceased daughters, and their issue of children to draw what would be their mother's share if they were all in life."

P. J. Philips was appointed her executor, qualified, gave the bonds and \$600.00 in cash to make them of full value. He died without child or children living at his death. Mrs. Laura Philips, his widow, administered his estate. The remainder-men brought suit against the executor to recover the \$600.00, alleging his receipt thereof, his refusal to pay his life estate therein, and her refusal to pay; to which he pleaded the general issue and set-off.

The plaintiffs introduced in evidence the will of Anna Davie; a return of P. J. Philips, in which he acknowledged the receipt of \$600.00 to make the bonds of par value; a return of Mrs. Laura Philips, administratrix of P. J. Philips, showing her receipt of over \$2,000.00 cash in hand at the death of P. J. Philips, besides \$6,000.00 of other cash assets, and rested their cause. Counsel for defendant moved a non-suit, which was overruled by the court, and defendant excepted.

Testimony for the defence was then introduced, which was that P. J. Philips did not keep the \$600.00 separate from his own money, and that the cash returned by her he had on deposit, and closed.

The court was requested to charge the jury—

1. If Mrs. Philips did not have the specific money in hand, then the jury must find for the defendant.

2. Whilst it is competent by proper words to create a life estate in money, yet if the money was to be received by Philips without let or hindrance, and if he received it, used it as his own, and did not keep it separate for the estate or remainder-men, then plaintiffs cannot recover.

3. If the jury believe that the intestate commingled the \$600.00 with his own money, so that it could not be distinguished from the balance of his estate, then this action does not lie.

4. If the jury believe that the third clause in the will gives an absolute estate, and the sixth makes a limitation over, the limitation is void.

5. That if the jury believe all the testimony of the plaintiffs, they cannot recover.

All of which requests were refused by the court, and the defendant excepted.

1. The first question made by the record for our review is, was the motion for a non-suit properly overruled? It was in effect a demurrer to the plaintiffs' right to recover under the evidence submitted, and this depends upon the construction of the clauses in the will, and the form of the action employed to enforce the right.

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Philips, administratrix, vs. Crews et al.

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Under the judiciary act of 1799, all that was required of the plaintiff was that he plainly, fully and distinctly state his cause of action, and, under the act of 1818, technical or formal objections are not to invalidate any pleading if the same substantially conforms to the requisites of the provisions of the act of 1799, and if the defendant has had notice, all other objections shall be dismissed. Under the English rule of pleading, this was not the case, and would have been maintained. Money received lies to recover money which *ex equo et bono* the defendant ought to pay. Whenever the plaintiff can recover in a court of equity he can recover in an action for money had and received. Chitty on Con., 474; 153; 1 Cowper R., 372; 6 Peters, 68. This is established in the 7th Ga., 68, 69.

We are unable to see any legal reason why if this administratrix got possession of this estate by means of her administration upon it, and she could not have gotten it any other way, and had its money in her hands as such, her suit would not lie against her as such administratrix to recover it.

The cardinal rule for construing wills is to ascertain the intention of the testator, and if that intention be not manifest when it is to be carried out by the courts as in this case.

That Mrs. Davie intended to give to her son, Philip, a life estate only in the property and money bequeathed to him, it seems to us to be too plain for a moment to dispute. He is to have it for life; it "is for and to him and at his death to go to his children, if he had none, then to go to his brothers and the children of his deceased sisters; it was to follow the blood of the family." The intention being clear and indisputable, the bequest, as proposed, is natural and legal, it must be executed.

It is said that neither an estate in remainder, nor a trust, can be created in money, because it is such a perishable commodity as is destroyed in the use. Sometimes it is lost by use, but it should never be so with trust money.

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Philips, administratrix, *vs.* Crews, *et al.*

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He who undertakes to execute a trust is charged with the duty of seeing to it that it is not destroyed in the use; the income may be destroyed by its use, for it was so intended, but the *corpus* must be preserved for the remainder-men. A life estate may be created in money, and section 2253 of the Code does not allude to money, but to such things as perish with the usage. In the 20th *Ga.*, 793, it is ruled that there can be as little doubt of the executor's liability to account to the remainder-men for the money and notes left by the testator as the other property. In 2d Kent's Com., 252, this language is used: "Chattels may be limited over by way of remainder after a life interest in them is created, and there is no difference in that respect between money and any other chattel interest."

It was insisted on the argument that the words "without let or hindrance" entitled Philips to take this money, use it as his, and if he did, not keeping it separate from his own, that the plaintiffs cannot recover. These words are not so strong as where the testator gave his wife "full power to dispose of a part or all of the above described property in any manner she may think proper, and enjoy it in any way she may see fit during her natural life, and after her death I wish it equally divided between my children," and this remainder was held good. 23 *Ga.*, 515.

3. The fourth request to charge was properly refused, because the construction of the third and sixth items in the will, there being no uncertainty or ambiguity about them, was for the court and not the jury. Besides, every part of a will is to be taken together and given effect; if this cannot be done because of a conflict in the different parts, then that which is last must prevail over the first. We find no difficulty in construing this will so as to give effect to both these items; indeed, we think that they are perfectly consistent with each other.

Upon a review of all the points made in this bill of exceptions, we think that the judgment should be affirmed.

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 Lynch, administrator, vs. Kirby, administrator.
 

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NCH, administrator, vs. KIRBY, administrator.

declaration, in the short form, on a note signed individually, amended by alleging that a testator's will provided that his should be kept together and managed for the benefit of his and children; that, in pursuance of such provision, the executed money from plaintiff, which she used for the benefit of the estate, and gave the note sued on therefor, it was demurred to. Especially is this the case where the cause of action stated in the amendment was barred by the statute of limitations.

Administrators and executors. Contracts. Promissory Note. Before Judge UNDERWOOD. Coweta Superior Court. September Term, 1879.

Chandler, as administrator of Chandler, brought complaint against Kirby, as administrator *de bonis non* of Joseph Bohannon, on a promissory note dated March 6th, 1862, due six months after date to James W. Chandler, or bearer, by "E. Bohannon." The original declaration, in short form, was filed December 27th, 1869. Subsequently, in March, 1877, and September, 1879, plaintiff amended his declaration. The substance of these amendments was that the will of Bohannon directed as follows: "The estate be 'kept together and managed for the benefit of my wife and children, as though I still lived and able to manage.' That E. Bohannon was executrix. 'That, in order to manage said property, and carry on said business and support his family, it was necessary for testator to contract debts for food and clothing for his family and his negroes, for tuition bills, doctor's bills, and for stock, that often credit could not be had, and money had to be borrowed and used in purchasing said property, &c., &c.'"

That said note was given for \$500.00, loaned by Chandler to Bohannon, as executrix of said estate, and was invested by her in provisions and stock for said estate in accordance with the authority conferred on her



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Lynch, administrator, *vs.* Kirby, administrator.

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by said will; which said will, by its terms, made said E. Bohannan trustee for the execution of the powers delegated to her in the same. \* \* \*

"That in managing said estate, carrying on the business of farming, raising the family of said testator and supporting his negroes and stock, it was impossible to get along successfully without contracting debts, borrowing money and making notes, and such was the custom of said testator in his lifetime, and he would have done the same had he been placed in like circumstances."

The amendment also set out the property received by E. Bohannan, executrix, and that turned over to Kirby, her successor, and alleged the payment of other like debts and of ten dollars on this note by defendant; and also, that Mrs. Bohannan had turned over everything she had to Kirby as belonging to the estate.

On demurrer the case was dismissed, and plaintiff excepted.

L. R. RAY, for plaintiff in error, cited 25 *Ga.*, 242; 56 *Ib.*, 642; 52 *Ib.*, 487, 500; 56 *Ib.*, 538; 38 *Ib.*, 581.

JOHN S. BIGBY; ORLANDO MCLENDON, for defendant, cited 56 *Ga.*, 396, 309; 25 *Ib.*, 240; 57 *Ib.*, 260; 39 *Ib.*, 130; 61 *Ib.*, 256; 49 *Ib.*, 355.

WARNER, Chief Justice.

On December 27th, 1869, the plaintiff brought his action against the defendant as the administrator of Joseph Bohannan, deceased, on a promissory note for \$500.00, dated March 6th, 1862, payable to plaintiff's intestate, due one day after date, and signed by E. Bohannan. On March 12th, 1877, the plaintiff amended his declaration alleging that E. Bohannan was the widow and executrix of Joseph Bohannan, and that by his will she was directed to keep his property together and manage it for the benefit of his wife and children, as though he still

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Maynard vs. Hunnewell, executrix.

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th them, and that the note sued on was given by executrix for the benefit of said estate in the due of her management thereof under said will, and to obtain a judgment against the defendant as administrator, upon the note of Mrs. Bohannon, so as to the estate in his hands to be administered liable for payment of the note, in the same manner as if a note had been given by a trustee for necessary articles furnished to the trust estate. The defendant demurred to the plaintiff's declaration, which the court sustained, and the plaintiff excepted.

There was no error in sustaining the demurrer. In *Stinson vs. Stinson*, 56 Ga., 396, it was held that an executor cannot bind the estate of his testator by the execution of a note signed by him as executor. The assets of the estate are only bound for the debts contracted by the testator during life. See 39 Ga., 130. In *Gaudy vs. Gaudy*, cited by the plaintiff in error, 56 Ga., 641, it was held that this rule has not been relaxed in this respect as to executors, administrators or guardians. Before we think the amendment was barred by the act of

the judgment of the court below be affirmed.

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MAYNARD vs. HUNNEWELL, executrix.

A verdict was rendered in favor of the plaintiff in a distress warrant, and a motion was made to enter up judgment for the full condemnation money thus found against the defendant on the securities on a replevy bond given by him, which was reversed on several grounds, issue formed, and a verdict returned in favor of the defendants, and the plaintiff excepted to certain rulings of the court, but served his bill of exceptions upon only one of the grounds, the writ of error will be dismissed. To set aside the judgment as to one, leaving it standing in favor of the plaintiff would work a discharge to him as to his liability to contribute to a final judgment should be obtained against the one served.



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Maynard *vs.* Hunnewell, executrix.

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Practice in the Supreme Court. Parties. Service.  
Before the Supreme Court. February Term, 1880.

Reported in the opinion.

O. G. GURLEY; I. A. BUSH, by JACKSON & LUMPKIN,  
for plaintiff in error.

B. B. BOWER, by E. C. BOWER, for defendant.

CRAWFORD, Justice.

A motion was made by counsel for defendant in error to dismiss this case for want of proper service.

The case itself arose on a motion in the court below to enter up a judgment upon a verdict which had been rendered against the defendant in a distress warrant, against the said defendant and his two securities on the replevy bond for the condemnation money found in said verdict. This motion was resisted upon several grounds; issues were formed thereon, and upon the trial a verdict was found for the defendants; the plaintiff being dissatisfied with the rulings of the court and the verdict, excepted.

Service of the bill of exceptions was perfected upon Mrs. Hunnewell, but none upon Thomas F. Hampton, administrator, etc., who was her co-defendant, and whose intestate was her testator's co-security on the replevy bond. This failure to serve the other defendant is fatal to a hearing in this court.

The verdict and judgment on the trial of the issues formed on the motion in the court below were in favor of both defendants; their testator and intestate were co-securities, with all the rights of contribution between themselves; to set aside therefore the verdict and judgment as to one, leaving it standing in favor of the other, would work a discharge to him as to his liability to contribute, if a final judgment should be obtained against

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*Ware et al. vs. The Trustees of Emory College et al.*

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endant in error. Any act of a creditor which as a discharge to one security is such an injury her as to discharge him also, and the failure to ampton a party by the plaintiff in error leaves argued.

ndently of this the ruling in this case is sup- y that of *Jordan vs. Kelly & Brothers*, decided at term, not yet reported, and *Curey vs. Hitch*, sol. l., 57 Ga., 197.

use must be dismissed.

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*et al. vs. THE TRUSTEES OF EMORY COLLEGE et al.*

justice, being disqualified from presiding in this case on account of being a ge Crisp, of the southwestern circuit, was designated by the governor to is place.]

a testator died in 1820, leaving a will, by which, after mak- ain specific bequests, he gave to trustees one-half of the of his estate in trust for his married daughter for life, and ould survive her husband, the trust should cease and the y vest in her, and then providing that if she should die, leav- child or children living at her death, such property should go children of her brother and sister, and after testator's death a land was made by the government of the United States to s and legal representatives of said testator :

the heirs and legal representatives took under the grant under the will.

rustees of the married daughter received in payment of her in the land so granted, \$5,000.00 in Georgia Railroad stock h her consent, conveyed it to Emory College, and afterwards, being a widow, old and childless, she relinquished and as- to the children of the brother and sister "all claims, if any l," to said railroad stock, and they, in 1856, by virtue of said ishment, and also in their own right as remainder-men under d of testator, filed their bill against the said college and rail- r against the college alone, to recover the same, and upon d in 1860, there was a verdict for the defendants, and there- n 1878, the said daughter having died childless, the grand- 5—19

children and representatives of the testator filed their bill against the said Emory College and the Georgia Railroad to recover the said stock under the will of testator :

*Held*, that Emory College, under the conveyance, acquired a good and valid title to the said stock.

3. That the grand-children of the testator had no remainder interest in the said stock.
4. That even if they had such interest, the judgment for the defendants on the bill filed in 1856 was a complete bar to the bill brought in 1878, as all their rights were adjudicated therein.

Wills. Estates. Title. Grant. Remainder. *Res adjudicata*. Former recovery. Before Judge SPEER. Newton Superior Court. September Term, 1879.

Ware *et al.* brought this bill against the trustees of Emory College and the Georgia Railroad alleging, in brief, as follows :

In 1820, Thomas Carr died testate. After making numerous specific bequests, the eleventh item of the will left one-half of the residue of the estate to the children of Susan B. Ware; the other half was left to William A. Carr and Nicholas Ware in trust for Selina A. Few, for life, free from the control of her husband, Ignatius Few; provided, that if she should outlive her husband, the trust should cease, and the property vest in her; provided, also, that if she should die without leaving living child or children, such property should go to the children of Susan B. Ware and William A. Carr, share and share alike. In other words, the will created an estate for the use of Mrs. Few for life, with executory devise to the said children.

The will was duly probated, etc. William A. Carr accepted the trust and became executor and trustee. While acting as trustee, he received a large amount of money and property, subject to the limitations stated, \$5,000.00 of which he invested in stock of the Georgia Railroad. Afterwards, in 1839, Carr was removed from the

reship, on a bill in Clarke superior court, and I. L. es succeeded him. Under this change, Carr trans- l to Graves, his successor, fifty shares of stock, h \$5,000.00) subject to the limitations already stated. 30, Graves, combining and confederating with the es of Emory College to defraud the devisees in nder, without any consideration whatever, and with- otice to parties in interest, or any order of court, rferred said stock to them (the trustees), and they with full notice of the manner in which he held. Georgia Railroad, also with full notice, made the fer on its books, and has ever since paid dividends ch transferees, in fraud of the devisees in remainder. 845, Few died, and thereupon the trust ceased, life estate with remainder over vested. He died rent, and there has never been administration on state. Graves also died during the life-time of Few, insolvent, and there has been no representa- on his estate. Mrs. Few never had any children, and childless in 1876. Thereupon the remainder created homas Carr's will vested, and the remainder-men be- entitled to the property or its proceeds, with divi- s, etc. Mrs. Few never had any property except as was subject to the conditions already stated. She insolvent, and there has never been administration r estate.

e estate of Thomas Carr has long been wound up; are no debts nor administration, and no need of any. plainants, therefore, are the persons entitled to the erty under the will of Carr, being the children of n B. Ware and William A. Carr, and those who rep- t such children. All parties in interest are parties e bill.

mplainants prayed—

) For discovery as to dividends, etc., etc. (not mate- ere).

) That the college be decreed to transfer the stock to plainants.

- (3.) Execution on failure to transfer.
- (4.) That the railroad be decreed to make the necessary changes on its books, etc.
- (5.) That the railroad be required to pay complainants the dividends accrued since 1876.
- (6.) That full and complete title to the stock be decreed to be in complainants.
- (7, 8.) General relief and subpoena.

To this bill defendants did not answer, but pleaded former recovery. The plea alleged that at September term, 1860, of Newton superior court, the same matters and things were adjudicated on a bill filed against the same defendants and I. L. Graves, by the same complainants, except that M. A. Veitch, E. W. Carr, and Susan A. Carr are now dead, and represented in this suit by their legal representatives.

The proceeding pleaded in bar was, in brief, as follows:

In 1856, Thomas W. Carr and others filed their bill against the trustees of Emory College, I. L. Graves, and the Georgia Railroad. They alleged as follows: Thomas Carr died leaving the will already described; William A. Carr was trustee, and was succeeded by Graves, who received forty-two shares of Georgia Railroad stock, with full notice of the limitations attaching to it. In 1840, Graves, in violation of his trust, and without consent of, or notice to, the beneficiaries, and without any consideration moving to them, transferred said stock to the trustees of Emory College, as complainants are informed, in payment of a debt of Ignatius Few, husband of Selina A. Few. In 1849, this stock was increased to seventy-three and one-half shares. Mrs. Few has never borne a child, and being advanced in years, it is not probable or possible that she will. In 1855, Mrs. Few made a deed conveying to complainants (the children of William A. Carr and Susan B. Ware) all her right, title and interest in and to the said shares of stock—she being then a widow, and *feme sole*. Charges collusion, etc.

The prayer was that the trustees be compelled to deliver up the certificates of stock held by them to be canceled, and account for dividends; that the railroad be decreed to issue new scrip to complainants in place of this; that they should have general relief and subpœna.

This bill had as exhibits to it the will of Thomas Carr, the removal of William A. Carr and appointment of Graves as trustee, receipt for the stock by Graves, notice by Carr to Graves of limitations, and conveyance by Mrs. Few to complainants of her life interest. Service of this bill was acknowledged by Judge J. J. Floyd, as attorney for Graves and the college. There was no official entry of service or acknowledgement by the Georgia Railroad.

Among the papers in the suit pleaded in bar was an amendment, which was substantially as follows: During the life of Thomas Carr, for services to the government, he became entitled to certain bounty lands. For some reason, it was necessary to apply to congress in regard to the lands. Pending this application he died, and afterwards congress passed an act allowing the heirs or legal representatives to lay off the land. W. A. Carr, executor, so. Some of the heirs general of Thomas Carr filed a bill about 1824, claiming that the land did not pass under the will, but to the heirs general. On demurrer it was dismissed. And further, that Ignatius Few transferred to William A. Carr any interest he might have in the lands. By the acquiescence of the parties, and by demurrer, sustained as above stated, the trusts of the lands were conclusively determined to attach to said lands. To this bill (the bill pleaded in bar) Graves answered substantially as follows: He knew nothing personally of Thomas Carr; had seen the will under which complainants claim, with the items as set forth by them. Admits the discharge of William A. Carr, as trustee, and his appointment under bill in Clarke superior court. The decree in that case provided for an election to take the railroad stock or notes of one Jamison on account of the lands in

Alabama. Under instructions from his *cestui que trust* defendant elected to take the stock, and did receive fifty shares; but upon an accounting before referees to whom the management of the trust was referred, this was found to be eight shares too much, and Graves reconveyed these eight to Carr. In 1840 these forty-two shares were conveyed to the college. It was done in this way: Graves gave to Mrs. Few a blank power of attorney to dispose of the stock; she gave to him an acquittance of his liability to her for said stock; he then transferred said stock to the trustees of the college, receiving nothing from them, but receiving from Mrs. Few's husband, Ignatius Few, a receipt for \$3780.00, as having been received by *him* from the hands of one Bryan, an agent of the college. Graves has heard that Few had used funds entrusted by the United States government to him, in purchasing property in Columbus, Georgia, and that he persuaded his wife to make the arrangement so as to settle in some way this difficulty. He gave her his notes for \$4,000.00 and a lien on Columbus property. In 1842, Few and Mrs. Few filed their bill against Graves. In it they set out the full trust, the removal of Carr and appointment of Graves, the receipt by him of trust funds, and they allege on account of threats of future suits against him, etc., he did not administer the trust satisfactory to them, and they prayed his removal and the appointment of Few. Answering this bill of 1842, Graves stated his administration of the trust to the best of his ability, and under the wishes of Mr. and Mrs. Few, and expressed his willingness to resign the trust if he could do so safely. These proceedings, Graves urged, were conclusive, and prevented a re-opening of accounts against him. He further alleged that he was advised and believed that complainants had no interest in these funds, because they arose from the proceeds of the sale of certain lands in Alabama, of which Thomas Carr was never seized, but which were granted after his death to his heirs and legal representatives, and an interest in

h was absolutely vested in Mrs. Few, as one of the general, and through her in her husband. The answer also states that Graves knew nothing about the service of Thomas Carr to the United States government, He denied confederation, etc., and exhibited verdict judgment appointing him, also proceedings discharging him, and receipts of Mr. and Mrs. Few.

The president of the board of trustees answered denying any knowledge of the matters charged in the bill.

The jury found generally for defendants, September 1. Complainants excepted.

The judgment was affirmed. (32 Ga., 557.)

Such was the plea in bar.

The complainants took exception to it, and filed a traverse on the following grounds:

1) The judgment pleaded in bar was not between the parties as the present suit.

2) The subject matters of the suit were different.

3) If any of the parties appear to be the same in the present suit, they sue now in a different right from what they sued in the former.

4) The issues in this suit were not involved before.

5) The sole issues involved in the former adjudication were the admissibility of certain evidence, and an estoppel against Mrs. Few by reason of a previous contract covering the life estate in the property in question.

6) There had been a former adjudication on the subject of the Alabama lands in Clarke superior court, on a bill filed in 1855, to which all the present parties, or their predecessors, were parties; and by which suit it was settled that the Alabama lands did pass under the will of Thomas Carr, and the proceeds were subject to the limitations of the will; and that it was not decided otherwise in the suit that the judgment was pleaded in bar.

7) The paper purporting to be an amendment to the bill, pleaded in bar never was filed, or served, or passed.



(8.) That the Alabama lands were not granted to the heirs of Thomas Carr, but were granted to him in his life time, and that it has not been decided otherwise, and statements to the contrary are erroneous.

On this traverse issue was joined.

Complainants introduced the following evidence :

(1.) Will of Thomas Carr, duly probated, etc., with letters of administration to William A. Carr.

(2.) Admission of the defendant's attorneys that the trustees held, and still hold, the stock transferred to them by Graves, trustee, and forming the subject matter of the suit.

(3.) Two acts of congress allowing the heirs and legal representatives of Carr and others a certain time within which to enter a tract of land in the land office, in lieu of certain land already granted to said Carr and others, by the state of Georgia, in 1786.

(4.) Record from Clarke superior court, showing discharge of W. A. Carr from the trusteeship, appointment of Graves, his acceptance of the trust, and his taking the stock under the decree.

(5.) Complainants offered in evidence the record of *Carr vs. Avery et al., administrators, et al.* To understand this record it is necessary to go over the nature of the litigation, as set out in the record itself, as follows: In 1820 Thomas Carr, the testator, died. In 1824 certain of the heirs general filed a bill against W. A. Carr, executor of Thomas Carr, setting out the manner in which the executor received and took possession of the Alabama lands, and was proceeding to administer them according to the will; they claimed that said lands did not pass under the will, but by inheritance to the heirs, (Mrs. Few being one of complainants) and they prayed a decree accordingly. On demurrer this bill was dismissed. The demurrer was general, and for non-joinder of parties. The heirs then acquiesced in the administration aforesaid by the executor, and he disposed of said lands, and paid

the proceeds according to the eleventh item of Carr's one-half to the children of Susan B. Ware, and one-half to W. A. Carr, as trustee of Mrs. Few. In 1839 he was discharged and Graves appointed to succeed him. Graves thus received the stock of the Georgia railroad as executor of W. A. Carr in the trusteeship. In 1850 *et al.*, administrators of Thomas D. Carr, a son of Thomas Carr, deceased, filed a bill against William A. Carr. They set out the manner of the grant of Alabama lands, the way in which he had taken possession of them, and alleging that they did not pass under the will of Thomas Carr, but directly to the heirs, and that William A. Carr's administration of them was a misappropriation; prayed that he be required to account for the lands and their proceeds to the heirs of Thomas Carr. When the case had reached this point, William A. Carr filed his answer against Avery *et al.*, administrators, and made all the heirs and residuary legatees of Thomas Carr parties. The bill cited all the facts above stated, giving a detailed history of the litigation; it claimed that the Alabama lands did pass under the will of Thomas Carr, that it had been so decided, that the heirs had acquiesced, and that the proceeds had been distributed subject to the limitations of the will, although this was against his interest, in being an heir, but not receiving any of these proceeds (under the will). The object of this bill was to settle the question whether the Alabama lands passed under the will, and to enjoin further suits upon that issue. A decree was found for complainant, and an injunction was granted accordingly. This was in 1855. When this record was offered in evidence, the court refused to admit it because the trustees of Emory college were not parties to it, and because it was irrelevant. Defendants introduced the record pleaded in bar, over the objection of complainants' counsel, including the remittitur from the supreme court. There was some testimony in regard to service of the

bill pleaded in bar, not material here. The case reported in 32 *Ga.*, 557, was also read by consent to the jury.

Complainants introduced two acts of congress dated —, by which authority was granted to the heirs and legal representatives of Thomas Carr (the testator) to locate certain land, under authority of which acts the Alabama lands were run off and held by the executor of Thomas Carr.

Under the charge, the jury found for defendants. Complainants moved for a new trial on the following, among other grounds:

(1.) Because the verdict was contrary to law and the evidence.

(2.) Because the court refused to charge the following request: "If you believe from the evidence that the suit pleaded in bar by the defendants was a suit to recover a life estate of Mrs. Few by virtue of an assignment or conveyance from her, and that the present suit is not to recover a life estate, but a remainder after the life estate, then the subject matter of the suits is not the same, and you will find against defendants' plea."

(3.) Because the court refused to give the following request without qualification: "If the jury believe from the evidence that the suit pleaded in bar was brought to recover a remainder interest, and was brought before the remainder vested—that is, if it was brought before the life estate ended and without proper reason to bring it at that time, such a suit would not bar the remaindermen from bringing another suit after the end of the life estate for the remainder interest."

The court added this qualification: "Unless the defense to said suit so brought waived the existence of the life-tenant and put their defense on grounds that barred both assignees and remainder-men; that is on the merits of the title held both by life-tenant and remainder-men; if this was done, and the case decided on its merits, it would be a bar to both life-tenant and remainder-men, if they were parties thereto."

Because the court refused to charge the following : "If you believe from the evidence that the of an estate for life under the will of Carr made a ance of her estate to the remainder-men, which ance was not valid, and that such remainder-men ed for the whole estate, the decision in that case ot bar a suit for the remainder interest on the end ife estate."

Because the court rejected the record of the case of . *Avery et al., administrators, et al.* set out in the e above.

motion was overruled, and complainants excepted.

. LUMPKIN; POPE BARROW; A. B. SIMMS, for fs in error.

J. FLOYD; CLARK & PACE; H. D. MCDANIEL, endants.

Judge.

1876, Selina A. Few departed this life. Whereupon fs in error, being the grand-children and repre- ves of grand-children of Thomas Carr, deceased, t their bill in Newton superior court against the ants in error, alleging that the remainder created will of Thomas Carr had vested, that the railroad ough with the proceeds of the Alabama lands, under the will of Carr, that the railroad and col- d notice of their interest at the time of taking, etc., ayed, amongst other things, that the college be de- o transfer the stock to complainants, pay divi- ince 1876, and that full and complete title to said e decreed in complainants. To this bill defend- d not answer, but pleaded former recovery. The plea that at the September term, 1860, of Newton or court, the same matters and things were adjudi- on a bill filed against the same defendants and I.

L. Graves by the same complainants, except that M. A. Veitch, E. W. Carr and Susan Carr are now dead and represented in this suit by their legal representative. The suit pleaded in bar was the bill of August 15th, 1855.

Complainants filed a traverse of this plea on the grounds, amongst others, that the judgment pleaded in bar was not between the same parties in the same right, and that there had been a former adjudication on the subject of the Alabama lands in Clarke superior court on a bill filed in 1855, to which all the present defendants, and their privies, were parties, by which it was settled that the Alabama lands did pass under the will of Thomas Carr, and the proceeds were subject to the limitations thereof, and that it was not decided otherwise in the suit at bar. The bill of 1855 appears in the statement of facts. On this traverse issue was joined, and the case went down to the jury. Under the charge a verdict was rendered for defendants and a decree entered accordingly. Complainants below excepted, and the case is brought here to review that finding.

We do not think the heirs and representatives of Thomas Carr took these Alabama lands under his will. After his death the government granted them, not to Carr, but to his heirs and representatives; none of the limitations established by the will apply to this property. Mr. Few, by virtue of his marriage with Selina Carr, became one of the heirs of Thomas Carr, and as such he was entitled to receive the proceeds, or his part of the proceeds, of the Alabama lands. He did not assert this right. W. A. Carr was the executor of Thomas Carr; as such he sold these Alabama lands, retaining the part to which Mr. Few was entitled, holding it as trustee for Mrs. Few. In 1836, upon his own application, he was discharged and L. Graves was appointed trustee in his stead. The decree appointing Graves provided "that for and on account of the lands sold in Alabama by the said W. A. Carr and granted by congress to the heirs and legal representative

as Carr, deceased, that said W. A. Carr pay his successor, said I. L. Graves, in trust for Mrs. 58.25." This Alabama land, or the proceeds, was property until this decree. It belonged to Mr. while Graves was trustee, with the consent of Mrs. *cestui que trust*, the property in litigation, the which Graves had received under the decree in lieu of money due Mrs. Few from Carr, was transferred to the trustees of Emory college, Mrs. Few receiving in return for said stock good and collectible notes amounting to one thousand two hundred dollars, and a lien on a lot and two lots in the city of Columbus; the property was sold by her she deposited with Graves, her trustee, and by him for her instead of said stock. In 1842 Mrs. Few becoming dissatisfied with her trustee, filed her petition in the superior court, praying for his removal and appointment of another in his stead; in this case a decree was rendered, approving the conduct of Graves in selling the railroad stock into other funds, removing I. L. Graves as trustee, and appointing Mr. Few. He accepted of the appointment, thereby estopping himself from denying that the property was trust property, made so by the decree of the court, and his consent, not made so by the will of Thomas Carr. Mrs. Few was the sole beneficiary of the trust, and the court has decided that, as against her, the college has no claim. 32 Ga., 557. Unless the Alabama land passed by the will of Thomas Carr complainants have no case. The court is nearly of the opinion that they did not so pass, and is satisfied to find that in this view we are sustained and distinguished a jurist as Judge Lumpkin; in 19 Ga., when discussing the will of Thomas Carr he says: "Alabama lands, it is true, were sold by William A. Carr, executor of his father, and the money invested in (slave) and railroad stock. But if these lands were sold by the government directly to the heirs of Thomas Carr subsequent to his death, then this fund could not be reached and affected by the trust in the will." Again,

Bush vs. Keaton, executor.

in 32 *Ga.*, page 566, on the same subject he says: "The heirs of Thomas Carr, excluding William A. Carr, the executor, sustained a great sacrifice in the premature sale of these lands, and that too under the executor's title which was not worth the paper it was written on."

Complainants insist that the verdict and decree rendered in 1855 on the bill of *Carr vs. Avery et al.*, is an adjudication that the Alabama lands did pass under the will of Carr, and these defendants are bound by that decree. They are not bound unless they were parties or privies. We cannot see that they were either; the trustees of Emory college had owned this stock more than ten years before that bill was filed.

We think, too, that the adjudication on the bill of 1856 was a complete bar to this bill, as all the rights of complainants were determined therein. See 32 *Ga.*, 557.

Judgment affirmed.

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BUSH vs. KEATON, executor.

1. The service of the bill of exceptions must affirmatively appear to have been made after the certificate of the presiding judge was attached thereto. (R.)
2. The certificate of the judge must affirmatively appear to have been attached to the bill of exceptions within thirty days from the adjournment of the term of the court at which the trial was had, or some reason therefor be given in the certificate showing that such delay was without fault of the complaining party. (R.)

Bill of exceptions. Practice in the Supreme Court February Term, 1880.

When this case was called counsel for defendant moved to dismiss the writ of error upon the following grounds:

1. Because it did not appear that the service of the bill of exceptions was made after the certificate by the presiding judge.
2. Because it did not appear that such certificate

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Bush vs. Keaton, executor.

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within thirty days from the adjournment of the court, which the trial was had.

facts upon which this motion was based were as

bill of exceptions concluded thus:

the claimant now comes, within thirty days from the adjournment of said court (which adjourned on the twenty-fifth day of November, 1879,) and presents this his bill of exceptions," etc.

Certificate of the presiding judge was not dated at the time of the acknowledgement of service was as follows:

and legal service of the within bill of exceptions acknowledged by copy and all further service waived. This November 4th,

(Signed)

B. B. BOWER,

for J. K. P. Keaton, ex'r of B. O. Keaton, def't in error."

On the motion it was replied, first, that the bill of exceptions recited that it was presented within thirty days, and that the certificate was verified by the judge's certificate, and as the certificate did not state any reason why it was not presented within time, the legal presumption that an officer properly performed his official duty would bring the certificate within the time prescribed by law; second, that the date of the acknowledgement of service, which was the date of the certificate of the judge, and which recognized the bill of exceptions as "the within bill of exceptions," was within thirty days from the adjournment of the court, and hence the bill of exceptions must have been certified within said time.

The court dismissed the case, enunciating the principle in the head-notes.

SHEFFIELD; I. A. BUSH, by JACKSON & LUMPKIN, plaintiffs in error.

BOWER; D. A. VASON; Z. D. HARRISON, for defendants in error.



## LAWRENCE &amp; POPE vs. THE MAYOR, ETC., OF MONTICELLO.

1. Where the judge's certificate to the bill of exceptions fails to state that it is true, the writ of error will be dismissed.
2. This defect is not cured by the fact that the bill of exceptions contains nothing but assignments of error upon the grounds taken in the motion for a new trial, and that such grounds appear in the record to have been certified as true by the presiding judge.

Practice in the Supreme Court. February Term, 1880.

When this case was called a motion was submitted to dismiss the writ of error because the judge's certificate to the bill of exceptions did not state it to be true. The material portion of his certificate was as follows:

"I do certify that the foregoing bill of exceptions, with the record in the case, contains all the evidence material to a clear understanding of the errors complained of; and the clerk of the superior court of Jasper county is hereby required," etc.

It was replied that the facts stated in the motion for new trial appeared from the transcript of the record to have been certified as true by the judge, and the bill of exceptions consisted of nothing but assignments of error upon the grounds taken in such motion.

The case was dismissed and the principles stated in the above head-notes enunciated.

C. W. JORDAN; BOLLING WHITFIELD, for plaintiffs in error.

BARTLETT & ANDERSON, for defendant.

*Smith et al. vs. Wheatley & Co. et al.—Turner vs. Wilcox, Gibbs & Co.*

*SMITH et al. vs. WHEATLEY & COMPANY et al.*

exception is taken to the granting or refusal to grant an injunction, the time prescribed in section 3213 of the Code for tendering, giving and forwarding the bill of exceptions, is imperative, and if the document be not transmitted to this court by the clerk, together with a transcript of the record, within fifteen days from the date of service, the writ of error will be dismissed.

Injunction. Bill of exceptions. Practice in the Supreme Court. February Term, 1880.

This case was upon writ of error to the refusal of an injunction. When called counsel for defendants moved to dismiss because the bill of exceptions and transcript of the record were not certified and transmitted by the clerk within fifteen days from the date of the service. The points upon which this motion was based were as follows: The application for injunction was heard and refused January 8th, 1880. The bill of exceptions to this decision was certified by the presiding judge on January 14th. Service was acknowledged on February 6th following. It was filed in the clerk's office on the twenty-fourth of February, and certified and transmitted by the clerk on March 1st following. The court sustained the motion, enunciating the principle set forth in the head-note.

A. A. ANSLEY; A. D. SMITH, for plaintiffs in error.

S. C. ELAM; Z. D. HARRISON, for defendants.

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TURNER vs. WILCOX, GIBBS & CO.

Where interrogatories and answers are omitted from the brief of evidence, the writ of error will be dismissed, and this though such omitted testimony may appear in another part of the record.

Where the judge indorses on the brief of evidence "revised and  
v 65—20

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Neal vs. The State.

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approved subject to corrections," the writ of error will be dismissed, unless it affirmatively appears that he subsequently finally passed upon such brief, making the corrections, if any were necessary.

Practice in the Supreme Court. February Term, 1880.

When this case was called, counsel for the defendants moved that the writ of error be dismissed because the brief of evidence was not revised and approved according to law, and because the written testimony of Reagan and other witnesses was not set out in such brief.

It appeared from an examination of the record that the judge had approved what purported to be the brief of evidence as stated in the second head-note. The record contained the depositions of several witnesses for the defendants which did not appear in the brief of evidence. The bill of exceptions showed that such omitted testimony was introduced on the trial, but contained no verification of the same.

The motion was sustained and the principles set forth in the head-notes enunciated.

COLLIER & CHARLTON, for plaintiff in error.

S. F. WEBB, for defendants.



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NEAL vs. THE STATE OF GEORGIA.

1. Where counsel for plaintiff in error were apprized of a defect in the record, and of the fact that the clerk's certificate to the bill of exceptions was fatally defective, in time to have had such defects corrected before the case was reached in this court, a suggestion of the diminution of the record will not be allowed on the call of the case, and the writ of error will be dismissed.
2. The certificate of the clerk to the bill of exceptions must cover the fact that it is the original, or the writ of error will be dismissed.

Diminution of the record. Practice in the Supreme Court. February Term, 1880.

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Collier *vs.* Leonard—Ware *vs.* Ware *et al.*, etc.

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In this case was called, counsel for plaintiff in error moved a diminution of the record, upon the ground the clerk had failed to send up a certified copy of the evidence, but had forwarded, in lieu thereof, a copy of the original, and because he had failed to transmit, duly certified, the original bill of exceptions.

The certificate of the clerk was as follows: "I hereby certify that the within is a full and complete transcript of the record and proceedings in the superior court of said county in an action of the state, plaintiff, and William H. Collier, defendant, and also the bill of exceptions. Witness my hand," etc.

It was objected that the counsel for plaintiff in error had been apprized of such defects for several months, and should have had them corrected before the call of the case. Counsel for the state, therefore, moved that the error be dismissed.

The court refused to allow the diminution of the record and dismissed the case.

JOHN KENNON; ARTHUR HOOD, JR., for plaintiff in

JOHN T. FLEWELLEN, solicitor-general, for the state

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COLLIER *vs.* LEONARD; WARE *vs.* WARE *et al.*; WILSON *et al.* *vs.* ARCHER *et al.*; GENTRY *vs.* COWAN, GENTRY & CO.

The court will reluctantly interfere with the grant of a first new trial, where the cases do not show such abuse of discretion as requires reversal.

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These cases are published in the following cases under the provisions of act of March 2, 1879.

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Rahilly *et al.* vs. Horton—Sum. Mac. R. Co. vs. Bohler, etc.

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RAHILLY *et al.* vs. HORTON ; THE SUM. MAC. R. CO. vs. BOHLER ; COTTLE *et al.* vs. COTTLE *et al.*; FRANKE vs. BERKNER *et al.*

The bill and answer, and the affidavits in support of each, being conflicting, this court will not control the discretion of the chancellor in granting an injunction. Whilst in his order the chancellor stated that he declined to decide the facts in dispute, yet the grant of an injunction shows on which side he considered the evidence preponderated.

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RIVERS vs. HOOD.

When a party in a justice court who had exhausted his continuances, moved again to continue on account of the sickness of a material witness, and the presiding justice stated that no subpoena had been asked for to bring in such witness, but that he had been at the store of the justice shortly before court, apparently well, there was no error in refusing a continuance.

WARNER, Chief Justice.

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DUBOSE, administrator, vs. CLEGHORN, HERRING & COMPANY *et al.*

Where on the application of the administrator, commissioners were appointed to divide certain lands in kind between three heirs representing one share in the estate, and such division was effected and return made to the ordinary, the share of one of such heirs so set apart is subject to judgments against him ; certainly so far as the administrator *de bonis non* is concerned, who claims to protect the former administrator from the loss of overpayments made to such heir. The fact that the administrator never accepted the receipt of such heir for the land does not affect the principle.

WARNER, Chief Justice.

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Buchanan vs. Willingham—Ayer & Co. vs. Kirkland, etc.

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BUCHANAN vs. WILLINGHAM.

An affidavit of illegality filed by a widow upon the ground that the execution was levied on property which had been set apart as a homestead to her deceased husband, was not demurrable because it failed to state that the plaintiff in *fi. fa.* had not filed an affidavit that his claim was within some one of the exceptions to the homestead act.

WARNER, Chief Justice.

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AYER & COMPANY vs. KIRKLAND.

Notice given by plaintiffs in *certiorari* to the opposite party "that they had applied for and had issued a *certiorari* returnable to the next term of the court," etc., was not a sufficient compliance with section 4059 of the Code, which requires notice to be given of the sanction of the writ of *certiorari*. In default of the notice required, the *certiorari* was properly dismissed.

WARNER, Chief Justice.

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LYON *et al.* vs. GRAY, administrator, *et al.*

1. The evidence being conflicting, and the presiding judge being satisfied with the verdict, this court will not control his discretion in refusing a new trial on the ground that the verdict is contrary to the evidence.
2. An exception to the entire charge will not be considered unless the charge, as a whole, was erroneous.

WARNER, Chief Justice.

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SHELTON vs. THE STATE OF GEORGIA.

1. The verdict in this case is supported by the evidence.
2. Newly discovered evidence, the effect of which is to impeach a witness for the state, is not ground for new trial.
3. A fine of \$200.00, with the alternative of serving twelve months in

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Moody *vs.* Griffin—Ransom & Co. *vs.* Roberts, etc.

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the chain-gang, is not excessive upon a conviction for carrying concealed weapons.

4. A new trial was properly refused in this case.

WARNER, Chief Justice.

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MOODY *vs.* GRIFFIN.

The son of the first cousin of one of the parties to a suit is not a competent juror; if the relationship be not discovered until after a verdict in favor of the party related to him, this court will not reverse the grant of a new trial on that ground.

WARNER, Chief Justice.

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RANSOM & COMPANY *vs.* ROBERTS; ESKRIDGE *vs.* BARROW.

The jury having passed upon the evidence, the presiding judge being satisfied with the finding, and there being no error of law alleged, this court will not interfere.

WARNER, Chief Justice.

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SHAW *vs.* GRIFFIN.

A *certiorari* is not brought until the petition is filed in office, and if the filing is more than three months after the decision complained of, the writ will be dismissed. 60 *Ga.*, 32.

JACKSON, Justice.

# CASES ARGUED AND DETERMINED

IN THE

## Supreme Court of Georgia,

AT ATLANTA.

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SEPTEMBER TERM, 1880.

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PRESENT—JAMES JACKSON,\* . . . CHIEF JUSTICE.  
MARTIN J. CRAWFORD, . . . ASSOCIATE "  
WILLIS A. HAWKINS. . . " "  
ALEXANDER M. SPEER, . . . " "

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COLQUITT & BAGGS *vs.* STULTZ.

he who receives collateral security is bound to the use of reasonable diligence in connection therewith. If the collateral be promissory notes or like evidences of debt, he is bound to use ordinary diligence to collect them. But where stock, worth about par, was deposited as collateral security, the creditor was not compelled, on failure of the debtors to pay the debt, to sell the collateral; although he had the option to do so, in the manner provided by the Code, §2140. He was not selling, although he knew that the debtors had failed in business, and the subsequent depreciation of the stock, constituted a valid defense to an action on the indebtedness, it not appearing that the debtors took any steps to secure a sale.

It did not alter the case that the stock was transferred on the books and new stock issued to the creditor. No sale was claimed, and he was bound only *sub modo*. A plea to an action on the debt which sought recoup because of the failure of the creditor to sell the collateral, and its subsequent depreciation, not caused by him, was demurrable.

Chief Justice WARNER having resigned, Justice JACKSON was appointed by the Court to succeed him. Hon. WILLIS A. HAWKINS was appointed to succeed Justice JACKSON. At the election by the General Assembly, in November, 1880, to fill these unexpired terms, together with that of Justice BLECKLEY, to whose seat Justice CRAWFORD had been appointed, Justice JACKSON was elected Chief Justice, and Justice CRAWFORD and J. M. SPEER, Associate Justices, Justice HAWKINS not being a candidate, and having consented to serve until the General Assembly convened.



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Colquitt & Baggs vs. Stultz.

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Pawn. Collateral security. Contracts. Damages. Negligence. Before Judge WRIGHT. Mitchell Superior Court. March Term, 1880.

Reported in the decision.

BUSH & LYON; R. N. ELY; D. H. POPE, for plaintiffs in error.

WARREN & HOBBS, for defendant.

JACKSON, Chief Justice.

To an action brought by the defendant in error against the plaintiffs in error, besides the general issue, the following pleas were filed: "And for further plea in this behalf, this defendant says that when defendants gave said plaintiff the promissory note now sued on, they also gave him, as collateral security for said note, a certificate of thirty shares of stock in ——— bank, a banking corporation located at Fort Valley, in said state, of one hundred dollars each, amounting in the aggregate to three thousand dollars, that when said note became due, and for some time thereafter, said bank stock was worth in the market, if it had been sold, enough to discharge said note. That said plaintiff took no steps to sell said stock or to realize on the same, but held the same after he knew that defendants had failed in business, and had been compelled to compromise with their creditors, until said bank stock had greatly depreciated. And defendant pleads that said plaintiff could, by the use of due care and diligence, have realized more than enough to discharge said note from the proceeds of said bank stock. Wherefore defendants say that said note has been fully paid off and discharged.

"And for further plea and answer, this defendant says that said stock was absolutely transferred to said plaintiff, that is to say, the stock was renewed and issued in the name of the plaintiff by said bank, and that the plaintiff, and he only,

had, or could have, any control of said stock; that at the time said note of defendants became due and owing, that said stock was worth about par, and that plaintiff could certainly have disposed of the same, and have paid the said note but that he failed to do so of his own accord, but held it and collected the dividends and distributive shares thereon until said stock failed; that the stock is now in the name of said plaintiff, and has become worthless except six or eight per cent. on same. By the failure of plaintiff to dispose of said stock or recover thereon, as he should have done, at the failure of defendants to pay said note, he has injured and damaged defendants, and defendants are entitled to recoup for the same in the sum of fifteen hundred dollars, or other large sum, which he prays may be allowed as a recoupment against plaintiff's demand."

The court, on demurrer, struck the said two pleas, and this being done, the plea of the general issue was withdrawn, and the court rendered judgment against the defendants; whereupon they excepted, and assign for error the striking said pleas.

1. The property in the hands of the plaintiff as a pawn collateral security, consisted of bank stock. The only defect attributed to the plaintiff by the first of the two taken pleas by which defendants are alleged to have sustained damage, is the failure to sell the stock and realize it when he ascertained that defendants had failed in business, and had been compelled to compromise with their creditors, until the stock fell from par to eight or ten per cent., whereas if the plaintiff had sold he would have realized enough to pay the debt, and therefore the plea concludes that the note is paid and pleads full payment, and discharge from any further payment.

We cannot see that the plea is good as a plea of payment. It does not allege that such was the contract between the parties; but sets out the transaction, not as payment but as collateral to insure or secure payment.

If the collateral or pawn had been promissory notes and the plaintiff had failed to sue and collect until the party became insolvent or in sinking circumstances, the plaintiff would have been guilty of negligence, and would have been responsible to defendants for the loss. But this was bank stock, the possession of which was given as collateral to secure the debt, and the only power the plaintiff had was to sell the stock, on notice of thirty days to the defendants. The defendants could have ordered the sale as well, or they could have paid the debt and sold and made five hundred dollars at the maturity of the note. Both parties seemed willing to risk the stock. If it has increased in value, the increased value would have been defendants' gain; as it depreciated they should bear the loss. Code, §§2138, 2139, *et seq.*

The plaintiff was bound for ordinary care of the stock. Code, §2145. If the deposit had been promissory notes or other evidences of debt, then he should have been ordinarily diligent to collect them. Code, §2145. But this was stock, not to be sued for, and his only negligence charged is not selling. This he had discretion to do or not; and if he did, he could only sell on terms prescribed by law. Code, §2140.

2. The second plea is a plea of recoupment. There is no allegation that the stock was sold by the defendants to the plaintiff—no price fixed therefor—no exchange of the stock for the note—nothing of the sort. The plea must be construed most strongly against the pleader, and we do not see any damage resulting from the negligence of plaintiff so as to authorize that it be recouped against him. On the contrary, he applied the dividends regularly, it appears from the declaration, to the note, by which fifteen hundred dollars thereon was paid, and he kept the stock, thus preserving the corpus of the collateral or pawn without deterioration by any action of his. His only fault charged against him in the plea is that he did not sell it, and that he could only have sold it as he held the

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Burnam vs. DeVaughn, for use.

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cate. Was it his duty to sell it? Did the law put on that obligation and charge him with negligence in selling? We think not. On the contrary, it was deal with him, and then only after notice to defendants and at public sale. Code, §2140.

title only passed *sub modo*, not from defendants, but certificate issued by the bank. It was only in him as collateral security. He applied the dividends to the note, the stock is ready to be returned. Had it appreciated, it would have made nothing; as it depreciated in his hands without legal negligence or fault on his part, he lost nothing. Had it appreciated, the profits would have been defendants; as it depreciated, the loss is theirs. The pleas were properly stricken and the judgment affirmed.

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BURNAM vs. DEVAUGHN, for use.

re the evidence introduced by the plaintiff would be sufficient to sustain a verdict in his favor, a non-suit should not be granted. In the suit on an open account the plaintiff testified positively as to the correctness of the items; that the goods, the price of which was paid for, were furnished; that most of them were sold by himself, and by his clerk; that he knew the account was correct by the books and by reference to his books, and that he could not tell exactly what amount he sold because his day-book was burned, but that he sold most of them himself, and knew the amount was correct because he kept the books himself: That this testimony was not objectional as being secondary. The verdict is supported by the evidence.

non-suit. Evidence. New trial. Before Judge SIMMONS, Houston Superior Court. April Term, 1880.

supported in the decision.

WIS & RILEY, for plaintiff in error.

DUNCAN & MILLER, for defendant.

CRAWFORD, Justice.

DeVaughn, who sued for the use of McLendon, brought an action against Mrs. C. N. Burnam on an open account after the plaintiff had introduced his testimony and closed the case. The defendant moved a non-suit, which was overruled by the court, and she excepted.

The defendant then offered herself as a witness, and after the testimony closed, the case went to the jury and they found for the plaintiff; whereupon Mrs. Burnam and her counsel moved for a new trial, which was refused and she again excepted.

The grounds relied upon for a new trial were the refusal of the court to award a non-suit, the inadmissibility of DeVaughn's testimony, and the want of sufficient evidence to support the verdict.

DeVaughn, who was only the nominal plaintiff, testified that the account was correct as to the items, dates and prices. That the goods mentioned therein were sold at the times and for the prices specified, and were delivered accordingly. Upon the cross-examination, he further testified that McLendon had a letter from Mrs. Burnam, which had been burned, authorizing Spivey, her agent, to buy supplies for her farm; that he sold the goods to the agent for her, and that McLendon had paid for them. Most of them were sold by himself, some by his clerk. He knew that the account was correct by the sales and reference to his books. He could not tell exactly the amount he sold because his day-book was burned, but he knows that he sold the most of them himself, and knows the amount correct because he kept the books himself.

1. It was upon this testimony that the non-suit was refused, and we think correctly; because it was sufficient to send the case to the jury, and wherever it is sufficient the judge would commit error to withhold it and assume

pass upon it himself. To move a non-suit is to invoke the judgment of the court upon the sufficiency of the evidence to maintain a verdict, for the rule in such cases is, that when the judge would not allow a verdict for the plaintiff to stand, for the want of sufficient evidence to sustain it, then on motion a non-suit will be awarded, but otherwise not.

The testimony of DeVaughn was objected to because it was claimed that he testified from his books; if there were so the objection would have been well taken, but we do not so construe it. He swears positively to the purchase and delivery of the goods, most of which he says he sold himself; he could not however tell *exactly* what amount he sold because his day-book had been burned. It being his book of original entries, and having been destroyed, we think his testimony admissible, even though he may have been testifying as to its contents. Mrs. Burnam was then introduced and testified that she had given Spivey a letter such as had been referred to by DeVaughn, nor had she authorized him to buy anything from her. He was however her agent and had authority to buy her supplies, and did so, as she bought nothing of her sort herself. He bought her bagging, ties, nails, meat and all such plantation articles as are in the account; he exercised general supervision and management of her crop and property.

It was upon this testimony and that of DeVaughn, that the jury passed, and we think it sufficient to warrant a verdict. Mrs. Burnam never denied that the articles were purchased or used by her, whilst she did testify that she had authority to buy them, that such were used on her property, and the only denial was, that she did not give him a letter as was represented, nor authorize him especially to buy from DeVaughn, which did not negative the plaintiff's proof. Her testimony strengthened the plain-

case.  
Judgment affirmed.

LATHROP & COMPANY vs. BROWN, executor, *et al.*

1. For a power to sell realty to survive the death of the grantor, it must be coupled with an interest, and that interest must be not in the proceeds alone of the thing to be sold, but in the thing itself. Therefore, an instrument in the form of a mortgage, which provided that in case of default in the payment of the debt thereby secured it should be lawful for the mortgagees to sell the property covered thereby, and the equity of the redemption of the mortgagor, according to the direction of the act of the legislature in such cases made and provided, accounting for the overplus, after satisfaction of the principal and interest due, the charge for advertising, the costs of foreclosure, and all attorney's fees and commissions, if there should be any overplus, to the mortgagor, did not vest such a power as would survive the mortgagor and take precedence of dower, year's support, expenses of administration, trust debts, etc.
2. That a part of the money, the repayment of which was secured by mortgage, was used in paying the purchase money of the land mortgaged, did not place it on a different status from the balance of the debt, there being no agreement to that effect.
3. A testator in his lifetime rented certain land and assigned the rent note or contract, and subsequently re-rented to the same tenant for the same year, and after his death his executor received a part of the rent under the second contract, and applied it to the payment of the year's support and other legitimate claims. The tenant was insolvent, and therefore a judgment obtained by the assignee was unproductive :

*Held*, that in a distribution of the estate, the assignees of the rent note would have a claim for the amount collected by the executor which would take precedence of a debt for money entrusted to the testator.

Title. Contracts. Mortgage. Powers. Lien. Administrators and executors. Before A. O. BACON, Esq. Judge *pro hac vice*. Bibb Superior Court. April Term 1880.

Reported in the decision.

WARREN & GRICE ; DUNCAN & MILLER, for plaintiffs in error.

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Lathrop & Co. vs. Brown, executor, *et al.*

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L, LOFTON & BARTLETT; J. H. HALL, for defend-

ON, Chief Justice.

R. Brown, Sr. died testate, and Wm. R. Brown, qualified as his executor. The testator was deeply in debt, some creditors claiming trust debts, and liens and mortgages of various grades, and the estate was not large enough to pay all. The widow and children claimed a year's support, and the widow's dower out of lands on which there were mortgages or liens in the nature of mortgages, and other creditors were under debts of various grades. Some of these suits were in suit and being pressed against the executor. Before he filed a bill to enjoin these suits, to marshal the assets of the estate and to settle priorities of the claims of the creditors, the widow's right to dower, and the family support for a year's support. A temporary injunction was granted to stay the pending suits, and the entire controversy in respect to assets and priority of claims of all parties on facts and law, was referred to the master in equity of the Macon circuit, to whose report both on facts and law exceptions were filed by J. W. Lathrop & Co. The exceptions on matters of fact were either withdrawn or the facts reported were so modified as to meet the conflicting views of the several creditors and claimants, and this narrowed the contest in the court below. The exceptions of law taken by Lathrop & Co. to the master's report.

In court, the Hon. A. O. Bacon, Judge *pro hac vice*, overruled and disallowed two of these exceptions of law, and sustained and allowed the third exception. To this ruling Lathrop & Co. excepted and assigned for error the decision which overruled their first and second exceptions of law, and the executor and Mary Jett, who claimed a trust debt against the testator, and



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Lathrop & Co. vs. Brown, executor, *et al.*

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the widow, excepted to the decision which sustained the third exception to the master's report, both parties uniting in the same bill of exceptions and writ of error, and these assignments of error make the questions for the adjudication of this court.

1. The facts necessary to elucidate the first exception are these: Lathrop & Co. claim that by virtue of a conveyance made to them by the testator while in life, to a plantation known as the Hog-crawl place, in Houston county, and to another plantation in Mitchell county, they are entitled to be paid their debt against the testator in preference to the dower, year's support and trust debt of Mary Jett Brown.

The conveyance made to Lathrop & Co. is dated twenty-fifth of December, 1873, and is to secure three promissory notes due respectively the first of October, first of November, and first of December, 1874, and similar to all statutory mortgages in its essential parts until you reach the following agreement and covenant which is in these words: "And it is hereby mutually covenanted and agreed between the parties to these presents, that if default shall be made in the payment of the principal secured to be paid to the said parties of the second part, and the interest which shall accrue thereupon at any time or times at which they shall be due, or of any part of such principal or interest, that then and thenceforth it shall be lawful for the parties of the second part, their heirs, executors and administrators or assigns, to grant, bargain, sell and dispose of the said hereby granted premises and all benefit and equity of redemption of the said party of the first part, his heirs, executors, administrators or assigns, therein, according to the directions of the act of the legislature in that case made and provided, rendering the overplus of the purchase money to be obtained for the same, after full satisfaction of the principal and interest to be due on such notes in manner aforesaid, and the charges of advertisement and sales and the costs of foreclosure

Lathrop & Co. vs. Brown, executor, *et al.*

the same, and all attorney's fees and commissions (if overplus there shall be) unto the party of the first of his heirs, executors, administrators or assigns."

Lathrop & Co. contend that this paper with the above covenant passed the title and power to sell this land to the grantor for the purpose of paying this indebtedness of \$15,000, and gave them the right to sell the same with such interest therein as survived the death of the grantor—whereby the lands never became assets for distribution in the hands of the executor of Wm. R. Brown, deceased, but that Wm. R. Brown in his lifetime had already by granted such an interest in them to Lathrop & Co. in connection with the power to sell the lands, as that they did not become assets for distribution under the law, and that therefore their right to sell and dispose out of these lands was superior to the claim of a widow for support, of dower and of the trust debt—that they advertised the lands for sale pursuant to this power, and were enjoined by the grant of a temporary injunction, and that this ought to be dissolved and the sale proceed; and that the executor, widow and beneficiary of the trust on the one hand maintain that Lathrop & Co. took no such interest in these lands by virtue of the covenant above recited, and as operated to make the power to sell survive, but that with the death of the testator the power died and the lands became assets for distribution according to the provisions of the statute, and that being so their claims are superior to the debt and lien of Lathrop & Co.

The court below ruled this point against Lathrop & Co., holding that the lands were assets, and on this the first point is assigned.

In order that a power to sell should survive the death of the grantor, it must be coupled with an interest, and the interest must be not in the proceeds alone of the thing sold but in the thing itself. Code, §2183; 2 Bouv. §1931, par. 2, p. 343; 8 Wheaton, 184; 10 Paige, 20;

2., 511.

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This paper with this covenant is only a mortgage. It does not convey title. It was not intended to convey title. Nothing in it shows such intention, and nothing outside of it is disclosed by this record to show such intention. It is merely a security for these three notes to have them paid when they severally became due; and the form of that security is merely a mortgage. There can be no doubt that if these parties had desired to have the title pass for the purpose of securing payment of the notes, it could have been accomplished by a conveyance to that effect, as this court has frequently held and is now well settled law here; 54 *Ga.*, 45; 55 *Ga.*, 650; 60 *Ga.* 434, 562, but the parties to the conveyance must intend to pass the title, and must by the instrument executed actually pass it.

So far from such being done by this conveyance, there is absolutely in it no power granted to Lathrop & Co. to sell at all, except after foreclosure of the mortgage, execution thereon, and advertisement according to law. The proceeds of sale are to pay the cost of foreclosure including counsel fees therefor, by the power granted wherefore is that provision inserted if the instrument were not a mortgage, and such a mortgage as had to be foreclosed?

It was, too, to be advertised. How long, and in what papers, and at what places? The instrument is dumb on these important questions, unless it speaks in this paragraph, "according to the directions of the act of the legislature in that case made and provided," which paragraph follows the power to sell whenever any part of the debt, principal or interest, shall fall due and default be made in the payment thereof. It would seem that the act of the legislature referred to is that in respect to the right to foreclose a mortgage, and the manner of foreclosure when the mortgage is executed to secure the payment of debts falling due at different times; and that act is found in §1965 of the Code, which declares that "if the

age is given to secure several debts falling due at different times, the mortgagee may foreclose when the mortgage becomes due, and the court will control the surplus to protect the lien created for the debts not due." In this mortgage the notes fall due at different times, and the clause of the Code seems to have been in the scrivener's mind when this paper was drawn. Be that as it may, it is quite clear that the words "foreclosure" "advertising," and the provision to pay for these counsel fees and costs, must refer to the mode of foreclosing and selling as prescribed in §3968 and preceding sections of the Code. They do not refer to these provisions in regard to sales of the foreclosures of mortgages, we cannot imagine to which they do refer; and the power to sell specifies neither the mode of advertising nor the time within which it is to be done.

The ruling in 54 Ga., 441, does not apply to this case. There, no foreclosure of the instrument was alluded to, and some of the terms for advertising were prescribed. The power to sell without foreclosure was clearly granted. In this case there is no power to sell without foreclosure; although Judge McCay in the 54 Ga., does express his opinion that the mortgagee has such an interest in the property mortgaged as to make the power irrevocable, yet he does not have meant, and did not mean, that it survived the death of the mortgagor, so as to defeat costs of administration, year's support, widow's dower and trust debts. As soon as the title passed, the lands were assets and must be administered as such after the death of the mortgagor. No such interest at law or in equity passed to these mortgagees as to divest the title of the testator and prevent the operation of the statute of distributions in applying it to the priority of creditors. 16 Tex., 492.

Error is also assigned by Lathrop & Co. because \$5,000 was paid by them as purchase money in part for the log-crawl plantation in Houston county, and was allowed them as a preferred claim on that place, even

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*Lathrop & Co. vs. Brown, executor, et al.*

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if their conveyance was only a mortgage and they had no surviving power to sell that land and pay all the indebtedness of the testator to them.

That claim rests on these facts: The jury found on the exception to the master's report on this point that the \$903.65, paid by Lathrop & Co. to J. F. Everett on the Hog-crawl place was paid before the death of Wm. R. Brown, Sr., to-wit, on the first of December, 1871, and that it was paid as part of the purchase money which Brown owed to Everett for the Hog-crawl place, but that there was no agreement of the parties that Lathrop & Co. should be subrogated to the rights of Everett. This sum of \$903.65, was part of the sum of \$15,000.00 secured by the mortgage, and we cannot see how it can have any superior right to the balance of the debt so secured, especially as there was no agreement to that effect. It was secured only by the mortgage, and if that security is inferior to the trust debt and the year's support, so is this part of the indebtedness which in common with the rest the parties agreed to secure by the mortgage, and by nothing else which they bargained for. We are aware of no law which subrogates Lathrop & Co. to the rights of Everett, and thereby elevates this claim above the costs of administration and the trust debt of the deceased. Especially must this be so when the trust money of Mary Jetts Brown to the amount of \$10,000.00 also was paid into this land by the deceased trustee. Certainly it could have no priority because it was purchase money over the trust fund, which was also purchase money paid for the land as well as trust money confided to the purchaser.

3. The third legal exception to the master's report was sustained by the court and allowed to Lathrop & Co., and to that judgment the trust creditor and the widow and children except and assign for error the ruling of the court below thereon. The facts are these: J. W. Lathrop & Co. held a claim against Clewis, a co-defendant, arising out of a rent contract made by and between the testator

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Lathrop & Co vs. Brown, executor, et al.

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Clewis, and transferred to Lathrop & Co. by regular assignment. After this assignment of the rent contract to Lathrop & Co., the said Brown made another contract with Clewis, re-renting the place, and the executor collected the rent of this rent, being for the same year, and used it for the year's support and other legitimate expenses, to the amount of \$1,450.00 with it. Clewis is indebted; Lathrop & Co. have judgment on the rent note assigned to them by Brown for a valuable consideration, and can make nothing out of it. The master held that the executor's claim was not superior to the trust debt, but the court reversed him and held that it was; and error is assigned on by the trust creditor.

We think that the court below did not err. This executor acted in equity. He has collected money on a claim which in equity and good conscience belonged to Lathrop & Co. The money has gone to pay legitimate and preferred claims of the estate, such as the year's support, which is paid with the costs of administration, and in this court of equity, which the executor has himself entered to set aside the equity done, he cannot retain funds which *ex æquo et bono* belong to another. It operated as a fraud on Lathrop & Co. to re-rent the plantation after assigning the rent previously given for the same rent to them; and as the executor has consummated it by collecting the new rent on a fraudulent claim, equity will not allow him to retain the money without accounting for it. Of course Lathrop & Co. cannot credit their debt with this sum, and if not so provided in the decree, it should be amended to that extent.

Looking the entire case together, we see no error in the judgment of the judge *pro hac vice*, and the judgment is affirmed.

Judgment affirmed.

## BUSH vs. ROGAN.

Though a deed be made to defraud creditors, neither the vendor nor those in privity with him will be allowed to set up this fact to defeat an action of ejectment brought by the vendee. The deed is good as between the parties thereto and those in privity with them though void as to creditors. Therefore the declaration of the vendor, whether made before or after the execution of the deed, as to his embarrassed condition, and the object of its execution, would be inadmissible.

Estoppel. Deed. Debtor and creditor. Before Judge WRIGHT, Dougherty Superior Court. April Term, 1880.

Reported in the opinion.

D. A. VASON, for plaintiff in error.

D. H. POPE, for defendant.

HAWKINS, Justice.

This was an action of ejectment brought by the plaintiff in error against the defendant, to recover a house and lot in the city of Albany.

The muniment of title relied upon by the plaintiff was a warranty deed from J. J. Bush, who was the son of plaintiff, dated the sixth day of January, 1876, and recorded January 15th, 1877. J. J. Bush having moved and died before the suit was brought, the widow of J. J. Bush defended the action, and relied on the evidence contained in her interrogatories to defeat the plaintiff's recovery. It appears that when the plaintiff took the deed he paid J. J. Bush \$600.00 cash for the same, the full consideration.

Mrs. J. J. Bush, widow of J. J. Bush, testified that J. J. Bush, at the time of making the deed to the city lot in Albany, Ga., to M. H. Bush, was, as *he said*, embarrassed pecuniarily, and made the deed to prevent his creditors from troubling him; this evidence was objected to on the

and that it was the sayings of the vendor after the execution of the deed, which was overruled and the testimony admitted.

The court charged the jury that if it appeared to them that the sayings were after the title passed to the plaintiff, the jury would not consider the testimony, but if before, it was competent.

Was this testimony competent either before or after execution of the deed, to defeat the recovery of the deed by the plaintiff from the vendor or his heirs, administrators or assigns, upon the ground that the same was executed to delay, defeat or hinder creditors? We think not. This court has settled the doctrine that a man is estopped by his deed, and he will not be permitted to prove the contrary except in cases abhorrent to law and public policy, such as usury, etc.; and this is true in cases where the deed is made to defraud creditors. A deed to delay, defeat, hinder and defraud creditors is void as to creditors, but good between the parties, and where the consideration is paid, neither the vendor nor his representative can set up the fact of the fraud to defeat a recovery. There are exceptions to the general rule, such as usury, gaming contracts, and such as the ascertainment of the truth in furtherance of public policy; and whilst the law will not assist the parties in *pari delicto* in certain cases, and forbid inquiry, upon the principle that the law will not assist in a fraud, yet in cases of fraudulent conveyances where the consideration is paid the transaction will be upheld *inter se*, and neither the vendor nor his representatives will be allowed to allege the contrary.

In 1 Ga., 551, this court says: "A party claiming under a grantor, as distributee or legatee, cannot impeach his title or grant for the want of consideration, or because it was intended to defraud creditors; both the grantor and his privies are estopped."

In 20 Ga., 660, in the case of *Goodwyn vs. Goodwyn*, this court says: "If A sells property to B to defraud his credi-



tors, while the compact is void as to creditors, it is nevertheless good as between A and B. If B paid the money for the property, he can sue for and recover it. Not so, however, if no consideration or price was paid." See, also, 19 Ga., 290, where the same ruling was made in the case of *Crossby vs. DeGraffenreid*. 22 Ga., 431, *Beale vs. Hall*. In the case in 44 Ga., this court has recognized the distinction in this class of cases where the conveyance was voluntary, and where the whole consideration was paid.

This being a controversy between the grantee and the representative of the grantor, we do not think it was competent to avoid the recovery by the declaration of the grantor that the deed was made to delay his creditors.

By the 24th section of the 13th and 27th Elizabeth, against conveyances to defraud creditors, and which is of force in Georgia, it is enacted that every conveyance to defraud creditors shall be void as to such creditors, and them only—and so is the Code, §1951.

The rules of evidence are founded on the soundest policy and reason, and are wisely accommodated to the transactions of mankind. They pervade all classes of the community, and are equally applicable to the commonwealth, the late proprietaries and each individual citizen. The oral or written assertions of any man may be received in evidence against himself, his heirs, and all persons claiming under him, because each of them stand precisely in the same situation and represent him. But when third persons set up an adverse title to such heirs or claimants derived from some person's grant or contract made by the original party, or some act done by themselves, their interest ceases to be the same, and such party cannot by declarations invalidate their conflicting claim.

It is *res inter alios acta*, and if provable at all, must be by the best evidence in the power of the party.

Judgment affirmed.

HOWARD vs. TUCKER *et al.*

minor cannot make a legal sale of land to her guardian.  
The sale of land by a minor to her guardian is not a legal sale,  
if it is acted on, and she receives a valuable consideration and  
owns it, or receives the benefit of it after majority, with full  
knowledge of her rights, she thereby ratifies the sale and will be  
bound by it.

The questions in this case were not fully submitted and passed  
on, and a new trial is granted.

Guardian and ward. Contracts. New trial. Before  
CRISP. Sumter Superior Court. October Ad-  
vanced Term, 1879.

supported in the decision.

A. SMITH, for plaintiff in error.

G. SIMMONS; ALLEN FORT; W. A. BYRD, for de-  
fendants.

WYFORD, Justice.

Charles M. Tucker, Henrietta M. Tucker and Eli J.  
Tucker owned jointly five hundred acres of land, Charles  
owning one third interest in his own right, and being  
guardian for the other two, who were minors, went into  
possession and cultivated it until his death. John D.  
Brown, who was his security on the guardian's bond, and  
the brother of Mrs. Charles M., without letters of ad-  
ministration, then took possession and control thereof, and  
the said Mrs. Charles M. is still in possession. This  
case was filed by Eli J. Tucker praying a partition of the  
land and that Brown account for its rents. Henrietta  
Tucker had intermarried with one Howard and was made a party  
defendant. She answered the bill, admitted the facts set  
forth therein, and joined in the prayer for a partition,

claiming her one third interest. Brown also answered ; he admitted the guardianship of Charles M.: his possession of the land during his life, and his own since his death but denied that Henrietta had any interest in it, as the said Charles M. in his life-time had purchased the same from her at the sum of one thousand dollars ; that there was no written contract of the sale, but that the said Charles M. had paid on the same \$810.00, and when the balance was paid that she was to make him a deed to her said one third interest. He further answered that he had paid to Howard her authorized agent the sum of \$210.00 leaving due of the said purchase money about \$75.00 which had been tendered to her.

Upon these pleadings the cause was tried, but the only issue submitted to the jury was the sale of the land by Mrs. Howard ; the jury found against her under the evidence and charge, whereupon she moved a new trial.

The real questions presented by her motion are :

1. Can a ward make a legal sale of land to the guardian during minority ?

We hold that this cannot be done.

Real estate belonging to a ward must be sold according to law and in no other way. Code, §1828.

Minors are under disabilities as to making contracts, or disposing of property. Code, §1657.

The law protects a wife against her husband, a *cestui que trust* against the trustee, and a ward against a guardian.

We hold that no fiduciary, except by special provision of law, can deal for his own benefit with the subject matter of the trust, and this principle is so well recognized and established as to need no citation of authorities. The judge below charged the jury that the first question to which he would call their attention was whether there was a contract of sale between Mrs. Howard and her guardian. Holding as we do that there can be no such contract, the jury, we apprehend, construed it to mean that it was such a contract as parties who are *sui juris* could enter

to and make, and were governed in their finding  
y.

The second question made by the motion and to be  
ered is :

an *agreement* for a sale is made, and the parties act  
t at the time and subsequently, in such way as to  
rate a fraud one upon the other unless it is carried  
n it be enforced? We hold that it may.

ere we speak of a contract in what we have said,  
an a contract that the law will enforce. Under our  
e contracts of infants except for necessities are  
out whilst that is true, an infant may do acts during  
minority, which by other acts done after his majority  
ake the first legal and binding. To apply this prin-  
o this case, Mrs. Howard could make no legal con-  
o sell her land, but suppose that she, notwithstand-  
r disability, did attempt to make one, and in pursu-  
hereof accepted the purchase price in property, or  
valuable consideration, and after her arrival at age  
ed the possession of such property, or enjoyed the  
eds of such valuable consideration, this continued  
sion or enjoyment would work a ratification of the  
ct and make it binding on her.

The last question arising in the case for our judg-  
is:

s the testimony sufficient to support the original  
ment to sell, and the subsequent ratification after  
Howard reached her majority, with a full knowledge  
part of her legal rights? We do not think that  
questions are fully or satisfactorily met by the  
and that there should be a new trial, with special  
ion directed to the original agreement to sell; what  
ty or money was received by Mrs. Howard's con-  
authority upon the agreement itself? and whether  
ts of ratification were made with knowledge that  
was no liability on the original contract, and that  
ad the legal right to repudiate it? The exercise of

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Smith vs. Eckles & Abercrombie.

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which right, however, would be coupled with the correlative obligation of responsibility for all acts done after her majority in connection therewith. "The privilege of fancy is to be used as a shield and not as a sword."

The only error in the judge's charge upon the subject of ratification is, in the failure to instruct the jury that whatsoever she did in that respect should have been done with a full knowledge of her rights in the premises, and with one authorized to act for the parties of the other part.

Judgment reversed.

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SMITH vs. ECKLES & ABERCROMBIE.

1. Where Eckles & Abercrombie were the defendants in error, and the bill of exceptions was an acknowledgment of service signed "Eckles & Abercrombie per John T. Eckles," it nowhere appearing who John T. Eckles was, the service was not sufficient.
2. One who takes a homestead or exemption, can only have set apart property owned by him at the time. The fact that one who did not own a horse or mule included in his petition for an exemption "one farm horse or mule," and that it was allowed, did not operate to exempt a horse subsequently purchased.

Practice in the Supreme Court. Homestead. Before Judge SPEER. Newton County. At Chambers. February 17th, 1880.

A *fi. fa.* in favor of Eckles & Abercrombie vs. Smith *et al.* was levied on a horse, and Mrs. Smith claimed it as exempted property. On the trial in the justice court where the case originated, it appeared that at the time Smith obtained his exemption he did not own a horse. In his schedule, however, he included "one farm horse or mule." Subsequently he bought a mule, and still later traded it for the horse now levied on. This it was claimed was exempt. The jury found it subject. Claimant paid

for the writ of *certiorari*, which was refused, and she  
ed. For the other facts see the decision.

ON, Chief Justice.

he bill of exceptions in this case has an acknowl-  
nt of service upon it signed in these words, "Eckles  
ercrombie per John T. Eckles." It nowhere ap-  
either in the bill of exceptions or in the record who  
T. Eckles is, whether one of the defendants in error  
nsel for them, or in what character he acknowledged  
e for that firm. So that the bill of exceptions, not  
properly served, might well be dismissed. But  
l having argued the case on the merits without no-  
the point, we proceed to consider the real point on  
erits.

That point is that the horse levied on was exempt,  
e wife of defendant in execution could claim it—  
n it was not exempt actually, because the defendant  
o horse at all when he had his exemption of per-  
y set apart. The idea of plaintiff in error is that  
n he had no horse to exempt at the time he applied  
e exemption and made out his schedule, yet as he  
the schedule the words "one horse," those words  
ed to exempt this horse bought a year or two after-

think that he should have had the horse exempted  
t became his property. It does not appear that he  
ought from the proceeds of any property sold which  
elonged to him at the time he filed his application,  
t was contained in his schedule; and in no view of  
w does the record show that the horse was not sub-  
o be sold to pay the plaintiff's debt.

e judge, therefore, was right in declining to grant the  
f *certiorari*, which was applied for from the verdict of  
y in the justice court which condemned the horse  
ed as subject to plaintiff's execution.

gment affirmed.

## MCKOY vs. EDWARDS.

1. That the levy of an execution against one defendant does not s  
as the property of whom the seizure is made, is no ground of  
gality.
2. Where illegality to execution levied on land is based on the fal  
of the return of the constable that there was no personal property  
be found, it is insufficient to allege that defendant has a sufficie  
of personal property on which to levy; it should be distinctly a  
red that defendant had such property at the time of the levy,  
that it was subject.

Levy and sale. Illegality. Before Judge CRISP. S  
ter Superior Court. October Adjourned Term, 1880.

Reported in the opinion.

ALLEN FORT, for plaintiff in error.

B. P. HOLLIS, for defendant.

HAWKINS, Justice.

On the twenty-eighth day of June, 1878, Edwards  
tained a verdict for fifty dollars principal in a justice co  
against McKoy. On the second day of July thereafter,  
N. Guery, constable, made an entry of no personal pr  
erty upon which to levy the *fi. fa.*, and on the same  
levied the same on real estate belonging to the defe  
ant McKoy, with full description of the property lev  
on except to state as whose property. McKoy filed  
illegality to the same, upon the grounds:

1. That the levy was insufficient in not saying "  
whose property" it was levied.
2. That he traverses the return of W. N. Guery, con  
ble, that there was no personal property to be found up  
which to levy the *fi. fa.*, and says that he had a sufficien  
of personal property in his possession on which to l  
said *fi. fa.*

The illegality was returned to Sumter superior court, a

At the trial the plaintiff in *fi. fa.* demurred to said illegality, and the defendant offered to amend by making a party, and try with the illegality the traverse of the bailiff's return on said *fi. fa.*, alleging therein that the same was filed at the first term of the court after the entry. The court refused the amendment and sustained the demurrer to the illegality, to which the defendant in *fi. fa.* excepts, and these are the assignments for error:

The execution was against but one defendant and the whole property was levied on, and there was a sufficient description of the property to pass a good title thereto at a public sale.

Whether the entry of no personal property was true or false, it being on the *fi. fa.* an innocent purchaser at public sale would have gotten a good title.

It was a fixed rule at the common law that the return of an officer could not be traversed or demurred to; the remedy was by suit against the officer for a false return.

Our statute has changed the common law as to returns by a sheriff or other officer of the court, but whether it can be extended to bailiffs and officers of justice and other officers is not of record, seems to be doubtful. But it is unnecessary here to decide, as this traverse is insufficient in this, that it fails to declare that the defendant, McKoy, had personal property at the date of the return sufficient to levy and sale sufficient to pay said execution, or that he did not point out the real estate. The illegality would have put in issue every material element contained in the levy; that he had then personal property sufficient, that he "has personal property," etc., when the traverse is filed, as he may have acquired the personal property afterwards. Also that the personal property in his possession was subject to levy and sale. He may have had personal property sufficient to pay ten times the amount and yet it be subject to levy and sale, as for instance, he may have had a homestead or exemption therein.



The return of the bailiff may be true for all that appears in the affidavit of illegality. It was too uncertain and the court committed no error in refusing to allow the same and in dismissing the illegality.

Judgment affirmed.

### ROOKS vs. THE STATE OF GEORGIA.

1. While we think it a sound rule of practice, in putting witnesses under the rule, to swear all of them on both sides and send them out of hearing until called to testify, still we know of no law which renders a witness incompetent because he has heard some of the testimony on the side opposed to that on which he was called. It might be a ground to attach the witness, but not to exclude him.
2. In a criminal case the venue must be proved beyond a reasonable doubt.

Witness. Practice in the Superior Court. Venue. Criminal law. Before Judge SPEER. Monroe Superior Court. February Term, 1880.

Reported in the decision.

BERNER & TURNER; H. C. PEEPLES, for plaintiff in error.

F. D. DISMUKE, solicitor general; STEWART & HALL for the State.

CRAWFORD, Justice.

Henry Rooks was convicted of malicious mischief in the court below, and by his bill of exceptions claims that the errors committed entitle him to a new trial. He submits:

1. That Robert Lyon, a witness for him, was not permitted to testify in his behalf, because after having been

orn and "put under the rule," he was present in the court-room and heard the testimony of the witnesses on a part of the state.

The law is that "in all cases either party has the right to have the witnesses of the *other party* examined out of the hearing of each other." Whilst this is the rule of law upon this subject, yet it is the practice of the courts, whenever requested, to have all the witnesses, both for the state and the accused, called in and sworn, and then directed to retire beyond the limits of the court-room, and there remain without communication with any one until what may have been sworn in the case, until they are called to the stand themselves to testify.

We recognize this as a sound rule of practice, and think that the court should take proper care to effect this object as far as practicable and convenient, yet we know of no legal right existing in one party to have a witness excluded from the stand because he happened to be present when the witnesses of the other party were testifying. We do not think that the court itself should go to the extent of depriving a party of the testimony of his witness, because that witness has disobeyed the order given excluding his presence in the court-room at an improper time. At most it was only an irregularity, and may have amounted to a contempt for which the witness might have been fined, but to *exclude* him, might deny the party of the testimony of the only person in the world by whom he could prove his innocence. Such is not law. Code, § 53. 27 Ga., 288.

It is claimed in this ground that the verdict is contrary to law, because it nowhere appears in the testimony that the venue is proven. An examination establishes the fact that it was not shown by any of the witnesses that the crime, if committed at all, was committed in the county of Monroe. No conviction is legal unless the venue is made to appear beyond a reasonable doubt; and the verdict has been held contrary to law where the testi-

mony does not show that the offence was committed in the county where the defendant was tried. 48 *Ga.*, 43 56 *Ib.*, 36; *Moye vs. The State*, September Term, 1880.  
Judgment reversed.

### BROWN vs. THE STATE OF GEORGIA.

1. That persons discussed a case on trial near the jury, will not be ground for a new trial where it appears that the jury did not hear anything that was said which could have influenced their finding.
2. Although there may have been minor inaccuracies in the charge as excepted to, when construed as a whole there appears to be no error which would require a new trial.
- (a) It is the better practice to have the grounds of a motion for new trial correct in themselves before granting a rule *nisi*, and not to refer to the entire charge to qualify them.
3. While the general rule is that cases will not be continued on account of the absence of witnesses outside of the reach of the compulsory process of the court, yet where there has been no want of diligence and the witness has promised to attend, his testimony being of great materiality, if the application is not made for delay only, but there is a reasonable expectation of procuring the testimony within a reasonable time, the case should be continued or postponed to a day certain, so as to give an opportunity to obtain it.
- (a.) Continuances are generally within the sound discretion of the presiding judge, but in this case the court based its ruling on the general rule stated above, which it held to be inflexible.

Criminal law. Jurors. Charge of Court. New trial. Continuance. Before Judge SPEER. Pike Superior Court. April Term, 1880.

To the report contained in the decision it is only necessary to add that one ground of the motion was predicated on the fact that several persons were discussing the case near where the jury were at dinner, and some opinions, adverse to the prisoner, were expressed. From the affidavits, however, it appears that the jury heard nothing beyond the mere fact that the case was under discussion.

STEWART & HALL; BOYNTON & HAMMOND; J. A. HUNT; F. L. HARALSON, for plaintiff in error.

F. D. DISMUKE, solicitor-general; HUNT & JOHNSON, for the state.

JACKSON, Chief Justice.

The defendant was indicted for the crime of murder, and was found guilty of manslaughter, and sentenced to fifteen years imprisonment in the penitentiary. He made a motion for a new trial on various grounds therein alleged, affecting the charge of the court and irregularities of the trial, but mainly on the ground that the court committed error in refusing to grant his application for a continuance.

1. 2. There seems to have been no irregularity either in the jury or the bailiff, and no word spoken in *their deliberating* which could have affected their verdict. There may have been inaccuracies in the charge of the court as to the portions excepted to, considered by themselves, but when construed in the light of the entire charge, they do not seem to be of that gravity which would imperatively require the grant of a new trial, especially in view of the evidence before the jury.

In a note to many of the grounds which he certifies, the judge refers to his charge at length, which is incorporated in the record, and made part of, the motion for a new trial; but it would be the better practice before granting the rule *nisi*, that the court should require counsel to perfect each ground of the motion, and make it conform to the charge as itself, without reference to outside matters in the charge at length. However, in the view we take of the case, it is not necessary to scrutinize these exceptions closely, because a new trial will be granted on the continuance, and the presumption is that if there be any serious inaccuracy in the charge, it will be corrected.

3. The motion for a new trial on the ground of error in

the refusal to continue, is based on the point that the court below declined to exercise any discretion, because the witnesses were absent in Alabama, and beyond the jurisdiction of the court to compel their attendance. There were two witnesses, the testimony of each was material and went to the vitals of the case. The motion was in writing, and was as follows; "Because of the absence of Rollin Hand, a material witness for his defense, who was at the time of the offense alleged to have been committed a citizen of said county, but has since removed to the county of Tallapoosa, state of Alabama; that owing to his recent arrest he has not had an opportunity of sending for him and bringing him to this court; that this motion is not made for delay, but for the purpose of getting the benefit of the testimony of said witness, who promised the brother of deponent that he would attend the court and testify at any time when he should be thereto requested. And deponent expects to prove by said witness that he was present and saw the difficulty on which the indictment is based, and that prior to the alleged shooting that the deceased was advancing on deponent with an open knife in a threatening attitude, and continued to advance, although twice warned and notified by deponent not to advance on him thus, and that the deceased continued to advance with his knife opened and threatening defendant until the firing occurred, and that the acts done by deponent were done in his own defense. That deponent has resided for the last nine years in the state of Texas, and was brought back, and arrived in the county of Pike on Wednesday of last week, and since that time has been incarcerated in the jail of said county.

Second, because of the absence of John Speer, a material witness for defendant, by whom he expected to prove that deceased, previous to the alleged shooting, had threatened to take the life of deponent if ever deponent passed down the road in which the homicide is said to have been committed, and that said John Speer commu-

ated these threats before the time of the alleged shooting to the deponent; that said John Speer resides in the county of Tallapoosa, state of Alabama at this time, and could not be subpoenaed or brought to this court, for the reason of his defendant's recent arrest and incarceration in the jail. That he does not make this motion for delay, but for the purpose of getting the benefit of the testimony of said witnesses, and that he has reason to believe, and fully believes he can get the benefit of their testimony at the next term of this court, and that this deponent did not know of the removal of said witnesses, Hand and Speer, from the county of Pike, until one or two days after he was placed in the jail last week, and that he has neither time nor opportunity of having them notified to appear."

Which motion was amended as follows:

Defendant, William W. Brown, amends his showing for continuance, and says this showing is made in good faith for the purpose of getting the testimony mentioned in the affidavits, and that he cannot go safely to trial without the evidence of the two witnesses named.

John M. Brown on oath says, that he has heard the above named witnesses say that they would swear as hereinbefore stated, and that said witnesses told him that they would come to court and testify as stated in affidavit of William Brown whenever requested or notified to attend court.

The issue before the jury was whether the defendant shot the deceased in self-defense, against an attack made on him with a deadly weapon, such as an open knife, with intent to commit a serious injury on the person of the prisoner, or whether he shot him when there was no such assault and no such imminent and impending danger as to excite the fears of a reasonable man, that it was necessary to shoot to protect himself from serious bodily harm.

On that issue proof of previous threats, communicated to the prisoner, and of an actual assault on the prisoner with a

drawn open knife, ready to stab or cut him, and in such proximity to him as to enable the witness to testify that the prisoner acted in self-defense, was all important to a fair trial of the defendant. And it appears from the record that the presiding judge would probably have granted the continuance, but for what he conceived to be an unbending law, or rule, that no continuance could be granted where the witness was beyond the jurisdiction. For the record discloses the fact, and it was admitted in argument, that the refusal to continue was based "on the ground that the witnesses resided beyond the limits of the state of Georgia." So that the discretion of the court was controlled by what he deemed an iron rule that no case could be continued for the absence of witnesses beyond the state. There is no such unbending rule of law. It is true that in 10 Ga., 85, Judge LUMPKIN says generally that witnesses on whose testimony application was made to continue a case, resided beyond the state, were not considered; yet the record printed in the report does not show that there were such witnesses, nor does the original record filed here in office show such absent witnesses. So that it is but *obiter* on the part of that learned and much respected judge. As a general rule, too, it is and ought to be law; but it ought not to be, and it is not, an unbending rule. Continuances are always within the sound discretion of the court, and should be granted when the ends of justice demand the grant. Code, §3531.

They have been granted in civil cases when witnesses were without the jurisdiction, and no law of the state where they resided was shown to compel them to testify. 30 Ga., 816; 29 Ga., 271.

Can it be that the law will allow a party to continue for the absence of testimony in civil cases, where but money or property is at stake, and refuse it where liberty and life are involved? It would seem not, from authority in some of our sister states. See 7 Cowen, 369; 41 Ill., 486.

And reason is as potent on the point as authority could well make it. A homicide occurs in Columbus. But two men witness the killing. One lives in Girard, just across the Chattahoochee, and has agreed to be at court the next week or next day, and his testimony is material for the defense. If the trial goes on, but one is present, and his testimony will convict, perhaps; shall not the defendant have delay enough to procure the other, if he has been diligent, and it is not his fault that the witness is away? We think so.

While the American states are exclusive in their jurisdiction and stand to each other much as foreign states, yet we cannot shut our eyes to the great fact that they constitute in many respects but one country, and that only imaginary lines of boundary—not even a river or creek—mark the two jurisdictions. Shall justice be defeated and a fair trial fail for want of witnesses just over the line, who are willing to attend the trial and will attend a week or two?

It cannot be. Whilst therefore the general rule is that cases will not be continued for absence of witnesses outside the reach of the compulsory process of the court, yet where there has been no lack of diligence, where the witness has promised to attend, where the testimony is of great materiality, where the application is not made for delay, but there is a reasonable expectation that the testimony will be on hand within a reasonable time, the case should be either continued for the term or postponed to a day certain, so as to give the defendant an opportunity of procuring the witness.

As to the sufficiency of such a showing the presiding judge will determine, and when he acts on it this court will, if at all, very reluctantly interfere with his discretion. In this case, he did not apply his discretion to the particular case made by the affidavits, but felt bound by the general rule expressed in *10 Ga.* So that we do not say he abused his discretion; for he exercised none, but yielded to what he regarded an inflexible rule of law.



A counter-showing was made by the state. In so far as it goes to show a different state of facts from those which the affidavit alleges that the absent witness will testify, it should not be considered; because the merits of the case cannot be tried on these affidavits or counter-affidavits by the judge; if so, trial by jury would be at an end. But as the presiding judge did not put his ruling on that counter-showing at all, but on the residence of the witnesses in Alabama, this question is not before us, and we need not go into the inquiry of what part of the counter-showing was admissible to be considered, and what not.

We forbear to express any opinion on the evidence; because a new trial is awarded on the absence of witnesses who may change the aspect of the case in substantial particulars, and because, as the prisoner is awarded a new hearing, it is important that he have one without any intimation from us as to his guilt; for in that event it would hardly be what the law intends a *new* trial to be—NEW—without regard to that old trial which this judgment annuls.

The judgment is reversed solely on the ground that the court erred in refusing the new trial because the two witnesses were in Alabama; it being the opinion of this court that while, as a general rule, cases should not be continued where absent witnesses are beyond the jurisdiction of the court, yet the rule is not so unbending as to deprive the judge of the right of exercising his discretion favorably when there is a probability of getting the witness to attend, and the ends of justice demand the attendance.

Judgment reversed.

SCOLLEY *vs.* POLLOCK.

in the field, not matured, as early as the twenty-eighth day of July, is not the subject of levy and sale, and therefore the purchaser of the crop in its then condition from the defendant in execution obtains a good title.

Levy and sale. Crops. Before Judge WRIGHT.  
Hill Superior Court. March Term, 1880.

Report unnecessary.

SH & LYON, by brief, for plaintiff in error.

O. DAVIS; D. H. POPE, for defendant.

KINS, Justice.

At the March term of Dougherty superior court, 1880, the case of Joseph Scolley *vs.* M. F. Howell *et al.*, being a *certiorari* case, came up for trial, when it was, upon the parties having agreed statement of facts, tried before the judge. The facts were: That the plaintiff obtained judgment against defendant *fi. fa.*, at the December term, 1873, of the justice of the peace of the 1033rd district, G. M.; that on the fifth day of November, 1877, said *fi. fa.*, was levied on 1,500 bushels of cotton, as the property of M. F. Howell, defendant; that Howell rented a field containing sixteen acres, and planted it in cotton, in the spring of 1877, and cultured the same until the twenty-eighth day of July, 1877, when he sold said crop to the claimant for the sum of forty dollars; that claimant ploughed part of the cotton after he bought it. There was a little of the cotton matured when it was sold. The cotton levied on is a part of the crop sold to claimant.

The judge, on hearing the same, sustained the *certiorari*, and decided that the crop was not subject to sale upon the facts contained in the *certiorari*, and as

appeared upon the facts which were submitted to the judge.

This is the only error complained of in the record.

Code, §3642, provides "that no sheriff or other officer shall levy upon any growing crop of corn, wheat, oats, rye, rice, cotton, potatoes or any other crop usually raised or cultivated by the planters or farmers of this state, nor sell the same until such crop shall be matured and fit to be gathered, unless in cases where the debtor absconds or removes from the state or county.

In 6 Ga., 455, the court says: "By law the growing crop could only be sold separately after maturity. Before maturity of crops they are appurtenant to the land, constitute a part thereof, and pass by and with the land. Before maturity the crops only constitute an element of value, and are not themselves distinct chattles. We know of no ruling to the contrary by this court.

It is true, this court has held that a crop planted may be mortgaged, but many equitable rights are subject to contract and mortgage which are not subject to levy and sale by a common law judgment and *fi. fa.* An undivided interest in a partnership, promissory notes, future interest, etc.

It is not every species of property that is subject to levy and sale, but only such personal property and real estate as is subject to identification, and has a corporeal status competent for seizure.

In this case the levy was upon cotton which was not matured and fit to be gathered on the twenty-eighth day of July, and therefore was not the subject matter of levy and sale.

Judgment affirmed.

COLQUITT, governor, *vs.* SMITH *et al.*

the condition in a criminal recognizance was that a principal should appear at a particular term of court, but it contained no provision as to appearing from term to term, or other like provision, the failure of the principal at the specified term was a compliance with the condition, and her failure to appear at a subsequent term at which the case was continued, would not subject the sureties to a forfeiture.

Decided. Principal and surety. Before Judge BUTT. Muscogee County. At Chambers. March 11th, 1880.

Not reported in the decision.

For E. THOMAS, Jr., by brief, for plaintiff in error.

For MORTON, GRIMES & CRAWFORD, for defendants.

For FORD, Justice.

Marie Smith being charged with the offense of larceny from the house, entered into bond with Joe Butler and John Broadnax as her securities, in the sum of forty dollars, for her appearance at the September term, 1879, of the county court of Muscogee.

The condition of her said bond was that if she did so appear and answer to the said charge, then the bond was to be void, otherwise to remain in full force. It did not contain the further condition commonly incorporated in recognizances, that she was to appear at the particular term specified, and then "from term to term to stand to and abide the judgment of the court," or that she was so to appear "and not depart thence without leave of the court." In compliance therefore with her obligation she appeared, but the case was continued over to the next adjourned term, and upon failing to appear, a forfeiture was granted against her and her securities. The se-

curities showed for cause against a forfeiture absolute that the said Carrie had appeared at the September term 1879, and that thereby they with their principal had kept their bond.

The court dismissed the rule *nisi* and discharged the securities, whereupon the solicitor for the county court petitioned the judge of the superior court to grant a *certiorari* in said case, which was refused and he excepted.

The only question made by this record therefore is whether the condition in a recognizance which binds the principal to appear at a particular term of the court, to answer upon a criminal charge, can be construed to extend the said appearance from term to term, so as to make the securities liable to a forfeiture for a failure of the principal to appear at any other term than that named in the bond.

We hold that it cannot; as the undertaking of the security is *stricti juris*, he cannot in law or equity be bound further than the very terms of his contract. Code, §215 10 Ga., 235.

Judgment affirmed.

#### RICHARDS vs. HUNT, RANKIN & LAMAR.

1. Where, with the consent and advice of a retiring partner, the firm name continues to be used, and there is no notice to a creditor who deals with the firm that he has retired, if such creditor acts on the faith that the old member, whom he knew from his own statements to have been for years a partner, is still so, and on the strength thereof credits the firm, though he may not do so till after the change, yet the retiring partner will be estopped from denying the partnership, and his liability thereunder.
2. That a witness has refreshed his memory since the trial of a case by reference to documents which were equally accessible before, is not such newly discovered testimony as to be ground for a new trial. Especially not, where the witness is also a party.
3. The verdict is too large by \$15.87, which is directed to be written off.

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Richards vs. Hunt, Rankin & Lamar.

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Partnership. Estoppel. Newly discovered evidence. Trial. Verdict. Before Judge SPEER. Rockdale Superior Court. February Term, 1880.

Rankin & Lamar sued Ayers & Co., alleged to be composed of Ayers, Smith and Richards, on an account. Richards pleaded no partnership. The declaration stated the principal debt at \$474.00, but the account showed the balance due to be \$458.13. On the trial, the jury found for the plaintiffs \$474.00, besides interest. Defendant moved for a new trial on the following, among other grounds:

Because the verdict was contrary to law and the facts.

Because of newly discovered testimony. This was based on the fact that since the trial one of the defendants (Smith) had refreshed his memory by reference to the invoice book of the firm, and remembered certain facts.

N. GLENN; J. J. FLOYD; HOPKINS & GLENN, for the plaintiff in error.

WATSON & CHRISTIAN, for defendants.

WATSON, Chief Justice.

Rankin & Lamar brought suit against Ayers & Co. on an account for various articles of merchandise, consisting of drugs and medicines and other merchandise. Richards alleged that the firm was composed of Ayers, Smith and Richards. Richards alone contested the claim, on the ground that he was not a partner when the goods were purchased. Under the charge of the court the jury found that he was a partner, and verdict was rendered against him as well as the other two. He moved to set it aside and have a new trial, and on its being refused him he excepted and the error assigned is the refusal of the presiding judge to grant him a new trial on the grounds set out

in the motion. These grounds the judge does not certify so far as they relate to the charge except as they conform to the charge written out, which is set out in the motion for a new trial and the bill of exceptions, and that which relates to his refusal to charge as requested, he states that it was not in writing nor does he remember any oral request of the sort. So that the question is narrowed to this point: Is the verdict under the evidence in accordance with the law or is it against the law; and so looking at it, the case is really before us on its merits without regard to the broken paragraphs of error in the charge, which do not appear certified, so that we can consider them *seriatim*.

The facts are that in 1876 and 1877, Ayers and Richards composed the firm of Ayers & Co.; that on the sixteenth day of January, 1878, Smith became a member of the firm; that an advertisement was made in the Conyers *Examiner* on the sixteenth day of February, 1878, to the effect that Ayers & Co. were carrying on business, and at the head of the advertisement appeared on one side Ayers' name, and on the other, Smith's; that the first bill of goods was sold on the fourteenth day of February, 1878, and so on through that year from time to time; that an invoice of the stock was taken on the sixteenth day of January, 1878, when Smith became a member, but that Ayers himself did not know until the fall of the year that Richards had retired from the firm; and that persons doing business on the same street in the village of Conyers did not know that he had retired; that no published notice of his having retired was made further than the one in the Conyers *Examiner*, if that by implication or legal effect did give notice that he had retired; that plaintiffs knew that Smith entered the firm, but did not know that Richards retired from it; that they credited on the strength of his name, neither of the other two being persons of property or credit; that Smith was the grandson-in-law of Richards; that no settlement was had

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een Ayers and Richards until the autumn of 1878, that involved other things besides the partnership, that Richards advised that the old name of the firm continued, and that it was continued in the same store under the same name as before.

On these facts the legal question is, was Richards liable as a member of the firm of Ayers & Co., and is the verdict for the evidence sustained by the law?

Premitting the remarkable fact that a partner should retire from a firm on the sixteenth day of January, and his copartner not know it until the succeeding month, and that business men on the same street in a village should not have heard of it, and taking it as that Mr. Richards ceased in fact and truth to be a member of the firm of Ayers & Co. on the sixteenth day of January, 1878, is he relieved from his liability to the creditors of the firm by any knowledge of theirs or notice to them which this record discloses?

As to the first sale on the fourteenth day of January, 1878, the publication in the newspaper gave no notice at all, because the sale was two days before the notice was published; so that unless the plaintiffs got notice in some other way, they had none when they began dealing with Ayers & Co., and all that the record discloses on that subject is that Rankin heard that Lucien Smith had gone into the firm in "the spring of 1878, or the early part of that year," but he understood that Richards was still in, and dealt on his credit, knowing that he had Richards as a partner in 1876 and 1877; and the additional fact that the agent, Bradfield, was told by Smith that Richards was out and Smith in the firm in his stead; but he could not tell whether this information was given to Bradfield, plaintiffs' agent, before or after the goods were

On these facts, we think, make the case that plaintiffs are liable on the footing of dealers with the old firm; for when they began to deal and sold one parcel of the goods



sued for, there is no evidence that they or their agent knew that Smith had become a partner, and thereby the old firm was dissolved. And the ruling in the case *Butler & Carrol vs. same defendant*, decided this morning, would cover this case.

But we are not disposed to let the principle which governs this case rest there. The record shows that the old name of the firm was continued, and that it was continued by the advice of the retiring partner; that no publication of any sort was given that Richards had retired, and that the world had no notice of the retirement. His old partner did not know it until the autumn following, and his nearest mercantile neighbors on the same street knew nothing of it. Under these facts, Richards is estopped from denying the partnership.

Wherever by the consent and advice of the retiring partner the old name of the firm continues to be used, and there is no notice to a creditor who deals with the firm that he has retired, and the creditor, though he never sold to the firm before the change, yet acted on the faith that the old member was still in the firm, having knowledge from him that he was a member for years before, and credited the firm on his name, such retiring partner is estopped from denying the partnership and his liability thereunder; especially when the goods are sold within a short time after the alleged retirement, in the absence of reasonable notice to the creditor. And this record shows no such reasonable notice. 24 Ohio, 598; *Parsons on Partnership*, 3d Ed., pp. 447, 448, 449; side pp., 412, 413; notes and cases cited.

2. The newly discovered evidence is simply that a witness has refreshed his memory since the last trial by an examination of documents, and would add to his testimony as to dates. We think diligence required of the party to ascertain what this witness knew beforehand, and could know by posting himself from the invoices, especially as the witness was the new partner who came into the firm, and was related to the retiring partner.

The verdict should have been for \$458.13, instead of \$400, as the principal debt—fifteen dollars and eighty cents of interest being added by the jury as principal.

Let the judgment be corrected accordingly, and when corrected be affirmed.

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COFFEE *vs.* ADAMS.

Record of the application for an exemption under the homestead laws of the state, must affirmatively disclose as whose property, either of the husband or wife, the exemption was claimed. For failure in this respect the exemplification of the proceedings in securing exemption was properly excluded.

Homestead. Evidence. Before Judge BUCHANAN.  
Campbell Superior Court. February Term, 1880.

Reported in the opinion.

T. SPENCE; C. W. HODNETT, for plaintiff in error.

S. ROAN, for defendant.

W. KINS, Justice.

encer Coffee, as the head of a family consisting of wife and minor children, brought an action of trover in Campbell superior court against Shadrack Adams, to recover one cow and two calves as exempted property, under the provisions of the Code of Georgia.

In this action defendant pleaded not guilty, and the statute of limitations. On the trial plaintiff, to support his claim, proved possession and conversion of the property by the defendant, and then tendered in evidence an exemption from the ordinary of Campbell county, of the same date, schedule and order of the ordinary allowing said

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Hare vs. The Atlanta City Brewing Co.

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exemption. Objection was made by defendant to the introduction of the homestead papers upon the ground that it did not appear in the petition or schedule who owned the property the exemption here claimed is. The petition was signed by the wife but did not state as whose property it was sought to be exempted.

The court rejected the evidence and on motion of defendant dismissed the case as if a non-suit.

These constitute the exceptions.

This question was ruled by this court in the case *Jones vs. Crumley*—see 61 Ga., 105—and must control in this case.

Judgment affirmed.

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#### HARE vs. THE ATLANTA CITY BREWING COMPANY.

Where beer in kegs was shipped by railroad to a purchaser, the agreement being that the kegs should be returned, when the purchaser received the bill of lading, paid the freight, and allowed the kegs to stand in the depot, he thereby received possession of them, and a refusal to return the kegs after demand amounted to a conversion.

Trover. Carriers. Before Judge CRISP. Sumter County Superior Court. October Adjourned Term, 1879.

Reported in the decision.

GUERRY & SON, for plaintiff in error.

N. A. SMITH, for defendant.

JACKSON, Chief Justice.

The Atlanta City Brewery Company brought trover against G. B. Hare for the recovery of a number of casks and barrels in which the company had shipped beer to him from Atlanta to Americus. It was their contract and cus-

tom for him to return the casks after the beer was emptied out of them. This he did not do and the company made a demand for the casks, and Hare declined to deliver them, at least some of them which were in the Americus depot. The jury found for the company damages for all the casks, and a new trial being denied Hare by the court below, the case is brought before us for review.

Hare did not and would not return the barrels because he alleged that the beer was bad, and said he would not return them unless the company paid him what he had paid it for the beer. Some of the barrels had been removed from the depot, others had not, but Hare had paid freight on all and held the bill of lading for all. On the trial it appears that he did not resist or defend the action so far as the casks at his store were concerned, but confined his defense to those at the depot. The court charged to the effect that the casks at the depot were in his possession, and when demanded and he refused to deliver or return them, they were converted to his own use in law, and the company could recover in trover; and this is the error assigned.

There was conflict in the testimony as to the beer, whether it was bad when it was shipped, or got so by the fault of defendant afterwards in keeping it in a hot place at the depot. Be that as it may, it was not the casks, but the beer which was sold to Hare. He acquired no title to the casks. He held the possession of them by holding the bill of lading, and paid freight on them. His only plea to the action of trover is not guilty, and when he declined to deliver the barrels to the company unless his money was returned which he had paid for beer, he converted the casks to his own use, to wit: to get back the money so paid. No plea of recoupment was filed. The charge is right on the issue made by the plea of not guilty, and the verdict is supported by the evidence, and the judgment must be affirmed.

Judgment affirmed.

## ELLIS vs. BARNETT.

An execution for \$58.91, predicated upon a debt contracted in 1873, was levied upon personal property of Barnett, the defendant. The debt was not one of those which, under the constitution, are good against a homestead. He had, before the levy, the property so levied upon set apart under the provisions of the constitution of 1877 as exempt. On submission of the case to the court, without a jury, he held the property not subject:

*Held*, that the court did not err, the amount of the property not being greater than that allowed by the Code or by the constitution of 1868, and it not appearing whether or not the exemption would be good thereunder.

Homestead. Before Judge HILLYER. Newton Superior Court. March Term, 1880.

Reported in the decision.

E. WOMACK, for plaintiff in error.

A. B. SIMMS; CAPERS DICKSON, for defendant.

HAWKINS, Justice.

This was a claim case tried in Newton superior court by the judge on an agreed statement of facts, without a jury, and the judge decided the property not subject.

This is the only error complained of. The agreed facts were as follows: It is conceded by counsel for the parties that the debt on which the *fi. fa.* was issued, was contracted in 1873 and not embraced in any of the exceptions specified in either the constitution of 1868 or 1877. That the property levied on is homestead property and the proceeds thereof—that application for said exemptions was made after and in conformity to the constitution of 1877, and the same was duly exempted by the ordinary in April, 1878.

It does not appear from the above agreement, from the

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*Jordan vs. Jordan.*

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ord of this case, or otherwise to this court, whether the exemption claimed would be good under the constitution of 1868 or under section 2040 of the Code.

The *fi. fa.* was for \$58.91 principal, levied on eight acres of growing cotton, more or less, in the field, 1,200 pounds in the house; ten acres of corn, more or less, (about fifteen barrels); also 500 bundles of fodder; also a gray mare, ten years old. This property does not exceed the amount allowed by the Code or the constitution of 1868.

The question therefore presented by this bill of exceptions is not what estate vests in the applicant for a homestead of \$1600.00 under the constitution of 1877, nor whether the same can be held or taken against existing debts by judgment or debts contracted theretofore, and we do not decide that question; from all that appears from the record before us, the property levied on could stand exempted from the debt of 1873, whether under the Code or the constitution of 1868.

Judgment affirmed.

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JORDAN *vs.* JORDAN.

[HAWKINS, Justice, having been of counsel did not preside in this case.]

The verdict in this case was contrary to the evidence.

The plaintiff sued the defendant for \$400.00. It appeared on the trial that defendant had agreed to give plaintiff \$1,000.00 to superintend certain planting interests, and was to pay an assistant to him \$400.00; if the defendant did not employ the assistant, plaintiff was to do so. Whether this employment was absolutely agreed on, or whether the assistant was to be employed if necessary, the evidence was conflicting. Plaintiff was paid \$1,000.00. No assistant was employed. Plaintiff sued for the \$400.00. There was nothing to show that he had any interest in it. The court charged that if the plaintiff was to have no interest in the assistant's wages, whether employed or not, his contract would be legally for only \$1,000.00. The jury found for plaintiff:

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Jordan vs Jordan.

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*Held*, that the verdict was contrary to the charge and contrary to law. If defendant was liable to plaintiff at all, it would be, not for the \$400.00, but for the amount of damages sustained by his failure to comply with the contract.

New trial. Verdict. Contracts. Before Judge SPEELMAN. Bibb Superior Court. October Term, 1879.

Reported in the decision.

BLOUNT & HARDEMAN; HILL & HARRIS, for plaintiff in error.

LANIER & ANDERSON, for defendant.

CRAWFORD, Justice.

S. T. Jordan sued L. A. Jordan to recover a balance of \$400.00, which he claimed to be due him for services in 1874, as superintendent over two of his plantations. The contract, as claimed by the plaintiff, was that he was to superintend the Fowl Town and Hill places, he was to have an assistant whom he was to employ, and upon his failure so to do then the defendant was to employ one. The stipulated price for the services of these two persons was \$1,400.00, \$1,000.00 for the plaintiff and \$400.00 for the assistant. This contract was changed by mutual consent, by substituting the Keaton for the Fowl Town place, but not otherwise. After this change the plaintiff took charge of the places and superintended them for the year, but no assistant was employed by either of the parties. At the end of the year the defendant paid the plaintiff \$1,000.00, and took his receipt for that amount.

The defendant claimed that an assistant was only to be employed *if necessary*, and that was before the substitution of the Keaton for the Fowl Town place, and when the change was made for the smaller places, all necessity for an assistant was dispensed with by the consent of the plaintiff, though he was still to have his same wages which were only one thousand dollars.

Upon these opposing theories the case was tried, the jury returned a verdict for the plaintiff, the defendant moved for a new trial, which was refused, and he excepted. The grounds of exception are several, but those upon which he principally relies are that the verdict is contrary to law, and contrary to evidence, and furthermore, that the jury found contrary to that part of the charge of the court wherein he instructed them as follows: "If you find the contract was that plaintiff was to superintend, and to aid of an assistant, the two farms for \$1,400.00, of which sum \$400.00 was to be paid to the assistant and no assistant was employed, and that plaintiff was to have no interest in the wages of the assistant, whether employed or not, then the contract of plaintiff would be legally only \$1,000.00, and you should so find."

As to the evidence. The plaintiff testified: "If I hired the assistant I was to get \$1,400.00, if he furnished one I was to get \$1,000.00. Col. Jordan preferred I should hire the assistant. He was to be paid \$400.00 out of \$1,400.00. That was my understanding of the contract. \* \* \* This arrangement was made at the state fair here, in 1873. \* \* \* I asked if in the change of places there would be any change in my salary, he said there would be no change."

The testimony of the defendant was like that of plaintiff in reference to the assistant, except he said that *if it was necessary* to have an assistant, etc., then he was to be employed. Touching the change of the places and contract, the defendant testifies that he said to the plaintiff: "As you could not get the assistant for the large station, I thought I would put you on the smaller ones, which would obviate the necessity of having one, the business being lighter, and you still get your thousand dollars, and he consented to the arrangement."

Again, another witness for defendant, testified: "Plaintiff told me that he was to have gotten \$1,000.00 for superintending the Fowl Town and Hill places, Jordan to



furnish a striker on the Hill place at \$400.00, that this arrangement was changed, but he was to get his same wages for supervising the Hill and Keaton places."

Flournoy testifies: "I distinctly remember hearing plaintiff agree, in December, 1873, to take the Hill and Keaton places at what he would have attended to the Fowl Town and Hill places for if he had succeeded in getting an assistant, but as he had not, he agreed to take the Hill and Keaton places for the sum agreed on."

The plaintiff in rebuttal testified: "Col. Jordan proposed the change; if agreeable to me I was to live on the Hill place and my assistant on the Keaton place; I accepted it with the understanding that I was to have an assistant, and there was to be no change in my wages. That is my version of the contract."

We think that the foregoing synopsis of the testimony will show that there is not enough to support the verdict. The plaintiff does not by his own statement swear positively to the first or second agreement, but after going over what he calls the first arrangement, he does not swear that that was the *contract*, but that was his *understanding* of it, evidently, as it appears to us, hesitatingly confronted as he was by the defendant and his witnesses. When a *plaintiff* comes into court suing on a contract, being a party thereto, he ought to *know* exactly what it was, and should not come saying I *thought* it was so, or *understood* it that way; this might be done by third parties, but not by those of the first and second parts.

Again, in testifying as to the second arrangement, the plaintiff proceeds to state it, and in the same doubtful and unsatisfactory manner says, "*that is my version of the contract*."

The defendant, Jordan, and his witnesses, testify positively as to what the contract was, and by their testimony the plaintiff has a verdict for \$400.00, to which sum he is not entitled. Still we would not have disturbed the verdict, although there were three witnesses testifying against the plaintiff, if he had not qualified his testimony

to impress us that he was not willing to swear with-  
out the qualification.

According to the view which we have of this case,  
the testimony, the finding of the jury was against  
the charge of the court as above set out. It was not  
contended that the plaintiff was to have any interest in the  
services of the assistant, whether employed or not, and  
therefore the verdict was against the evidence, because it  
was undoubtedly given upon the ground that that was  
the contract, and, not being sustained by the evidence,  
was contrary to law as well as contrary to the charge of  
the court.

Other questions arose on the trial as to the value of the  
contract between the first and the modified contract. The  
evidence which appear to have governed the case are not in  
harmony with our own. We hold that where a special  
contract is proven both parties are to be held to it. So  
in this case, if there were a special contract, such as  
alleged by the plaintiff, that he was to have an assistant,  
Jordan failed to furnish one, after having agreed to  
do so, then it does not follow that the plaintiff would be  
entitled to the wages that the assistant was to have gotten.  
He could recover only the damages he sustained by reason  
of the failure of the defendant to comply with his con-  
tract, the measure of which could not exceed the fourteen  
hundred dollars. Upon the other hand, if the special  
contract was as claimed by the defendant, then there could  
be no recovery at all.  
The judgment reversed.

## SMITH vs. BROOKS.

1. Where a contract containing a promise to pay both cotton as rent and money for provisions advanced by the landlord, was transferred by the following indorsement on its back: "For value received hereby transfer, assign and indorse the within lien and mortgage to R. P. Brooks, with full power to enforce the same" the landlord became an indorser for value; and in a suit against him by the transferee, the contract was admissible without first showing the insolvency of the tenant.
2. Such an indorser did not occupy the position of a surety, but of an indorser for value; and therefore a plea to the effect that about two weeks before the debt became due the indorser notified the holder to make the money, the tenant then having cotton subject therefor which he afterwards disposed of, that the holder failed to do so, and the debt was thereby lost, was demurrable. Especially so, if the county of the principal was not stated.
3. A plea which alleged that the contract and intention of the parties was not to render the landlord liable as an indorser, but simply to transfer the rent contract, and which prayed for a reformation accordingly, was demurrable, there being no specific allegation of fraud, accident or mistake in the use of the term "indorse."

Indorsement. Contracts. Principal and surety. Before Judge SIMMONS. Monroe Superior Court. February Term, 1880.

Reported in the decision.

W. D. STONE, for plaintiff in error.

BERNER & TURNER, by H. C. PEEPLES, for defendant.

JACKSON, Chief Justice.

This suit was brought on the following indorsement:

"For value received, I hereby transfer, assign and indorse the within lien and mortgage to R. P. Brooks, with full power to enforce the same. Witness my hand and seal this twentieth day of February, 1878.

H. N. SMITH, Landlord

"In presence of W. H. Head, N. P."

above indorsement was on the back of the following:

"FORSYTH, GA., February —, 1878.

or before the first day of October next I promise to pay H. N. landlord, or order, one thousand pounds of lint cotton, said to class middling, for rent of the premises occupied by me as tenant of H. N. Smith, landlord, in Monroe county, Georgia; said to be baled and delivered in good merchantable order to said H. N. Smith, landlord, or his assigns, at either warehouse in Forsyth, Ga. Also seventy-five dollars for provisions furnished me by the said H. N. Smith, landlord, to enable me to make my crops for the year 1878 on the premises occupied by me as the tenant of H. N. Smith, landlord, Monroe county, Georgia. In consideration of the advances made for which this obligation is given, I hereby give the said H. N. Smith, landlord, a lien as provided for by the 'act of the general assembly of Georgia, approved February 25th, 1875,' and the laws of said State, said act is amendatory, on my entire crops raised and grown the year 1878, and on my entire stock, and I hereby create in favor of H. N. Smith a mortgage on following stock, to-wit: — I further certify that no liens of any description exist on my said crops or stock except — I hereby waive all rights of homestead and personal exemption of either as against this obligation for myself and all who succeed or through me. In the event the sum called for in this obligation is collected through an attorney or by law, I agree and consent that ten per cent. on principal and interest may be recovered by me as reasonable attorneys' fees, with and in the same manner as principal and interest are recovered; and I further agree to pay interest at the rate of twelve per cent. per annum until paid, if this sum is not paid at maturity. Witness my hand and seal this 1st day of February, 1878.

his

"I. M. X DURHAM. [Seal.]

mark

signed, sealed and delivered in the presence of  
W. H. HEAD, N. P. and ex-off. J. P."

This suit on the indorsement before written the defendant filed and here insists upon the following two

Defendant says plaintiff should not maintain his suit, and that he is not liable on said lien or draft, for the reason that he says thirteen days or two weeks before the paper fell due (said plaintiff having possession of said

lien and also defendant's lien for his rent) he gave plaintiff notice as soon as the lien fell due to enforce collection of the same; that said Durham had the cotton subject to the same sufficient to pay the same; and gave plaintiff notice to collect his rent at the same time which plaintiff assured defendant he would do; defendant says that he supposed said plaintiff had collected both the amount due him on said lien as also defendant's rent and did not learn to the contrary until some thirty days after said paper fell due, at which time said Durham disposed of all his cotton and crops produced that year on said land so rented as aforesaid, and which was subject to said lien. Defendant says but for the assurance of plaintiff that he would enforce the collection of said lien he would have taken legal steps to have collected the plaintiff's debt and his rent. Defendant says, therefore, he will be damaged the full amount of plaintiff's debt, he has the same to pay, besides the loss of his rent, on account of the failure of plaintiff to carry out his promise, especially as said Durham had sufficient cotton on hand when said lien fell due, to have paid both claims, and squandered the same. Defendant says that said Durham was insolvent when said lien fell due, which fact was known to said plaintiff, and that his said cotton was specially subject to said lien—all of which he is willing to verify and prove.

2nd. Defendant says that plaintiff ought not to be allowed to recover in said suit, because he says that the written transfer upon the draft sued upon, and upon which it is sought to make this defendant liable as indorser, is signed as an indorsement, that such indorsement was a mistake, and its legal effect misunderstood, and it was never intended to be an indorsement of said draft or so as to render this defendant liable, but that it was intended and so understood that he simply transferred the draft or lien to the plaintiff, and if such transfer amounted to an indorsement to the extent of rendering this

defendant liable on said paper, defendant asks the court that said written transfer may be reformed and made to speak the contract and intention of the parties, which was that such writing on the back of said paper and signed by defendant, should be a simple transfer, and not an indorsement or any liability on the part of this defendant on said paper; and of this defendant puts himself on the country.

The errors assigned are the striking these two pleas, and after striking them, the admitting in evidence, under the general issue, the said paper with the indorsement thereon without requiring preliminary proof of the insolvency of the maker.

1. The last will be disposed of first. We see nothing in the indorsement to limit the indorser's liability. The instrument and indorsement show that he not only transferred and assigned, but indorsed for value, the lien or mortgage to secure a certain debt in cotton, but seventy-five dollars in money which was promised by the maker to be paid, and which was not paid by the maker. It is not a blank indorsement to be filled, but it is an indorsement for value received. The indorser is not even an accommodation indorser, but for value.

2. Were the pleas properly stricken? It seems so to us. The defendant was not an accommodation indorser, and therefore not a surety. Therefore the first plea is defective. The first is that two weeks before the lien fell due he gave notice to plaintiff to collect the note or obligation therein from the tenant, as well as his rent. Perhaps had he been an accommodation indorser, and therefore a surety, this notice, with the failure of the creditor to sue, and the loss of the debt from the principal, with the other allegations in the plea, would have made it good—Code, §2151; but as he was an indorser for value, the notice he could give so as to discharge him must be given *after* the note fell due. Code, §2156. This notice was given *before* it fell due some two weeks, and plaintiff had not the three

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 Osborn vs. Elder.
 

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months within which to sue. Nor was the county of the principal named in the notice as is required by the act of 1866.

3. The other is defective in that it does not set out that the parties, one or both, intended to leave out the word "indorse;" that this word was inserted by fraud, accident or mistake. This court has frequently ruled that to reform an instrument such allegation must be made; that the fraud, accident or mistake to authorize its reformation must be that the scrivener put in something or left out something which it was intended should be left out or inserted, and that it must appear in the allegation how and in what way the accident or mistake or fraud occurred. I struggled against the strictness of this view of the law; but the current swept over me, and it is well settled by this court. And since all parties are now allowed to swear in their own cases, the sanctity of written assurances would not amount to much where one or the other or both parties were bad men; and it is well that the rule is held stricter of late years than formerly on this account. In this view I am disposed to yield my hesitation about it, and give my assent to it. 59 Ga., 851, and cases cited. Judgment affirmed.

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 OSBORN vs. ELDER.

1. The following is too uncertain to be a levy in legal contemplation:  
 "Levied this *f. fa.* on one hundred and twenty-six acres of land as the property of M. O. Elder. This January 13, 1877.  
 [Signed] "A. CROW,  
 "County Court Bailiff."
2. The principle that one who by his acts or omissions has induced another to change his circumstances, without fault on his part, is estopped, applies to all sales, and this whether without such conduct the purchaser would have acquired a good title or not.

Levy and sale. *Caveat emptor.* Estoppel. Before

Judge ERWIN. Oconee Superior Court. July Term, 1880.

Reported in the decision.

LAMAR COBB; LYLE & KINNEBREW, for plaintiff in error.

POPE BARROW, by GEORGE D. THOMAS; E. K. LUMPKIN, by JACKSON & LUMPKIN, for defendant.

HAWKINS, Justice.

On the ninth day of July, 1879, William I. Elder brought his action of ejectment against A. C. Osborn in the superior court of Oconee county, to recover 126 acres of land, to which the said Osborn pleaded not guilty, and at the July term of Oconee superior court amended his plea of the general issue (or plea of not guilty) as follows: That he bought the land at sheriff's sale on the first Tuesday in March, 1877, under an execution in favor of S. C. Dobbs against M. O. Elder and J. L. Elder, without any notice of any defect in the title or any notice or knowledge of any irregularity in the process under which it was sold. That the plaintiff, W. I. Elder, was present at said sale and did not forbid the same and did not take any steps to prevent it; but was silent, knowing well that the land so bid off was sold as his land, perhaps intending to say his brother's land. The defendant paid a valuable consideration for said land and is a *bona fide* purchaser, without notice of any defect in the title. Defendant therefore insists that the said plaintiff is unquestionably estopped under the facts of this case, etc.

The case went to trial upon the foregoing issue and the following evidence was had on said trial: The plaintiff submitted a deed from John Elder, his father, dated in 1868 and proved possession in the father for a period of



over twenty years. Upon this proof the plaintiff rested.

The defendant showed his sheriff's deed, the *fi. fa.*, levied thereon, and proved that the sheriff had put him in possession under the sale. The following is the language of the levy entered on the *fi. fa.*: "Levied this *fi. fa.* on 100 acres of land as the property of M. O. Elder. This January 13th, 1877." Signed by the county court bailiff.

The plaintiff in ejectment testified that he was present at said sale, went to sheriff before sale, asked what land was referred to in the advertisement, sheriff said he did not know, he did not make the levy—knew nothing about it—then went to Thrasher, attorney representing the execution which sold the land, asked him same question, said he knew nothing about it—all he wanted was to get the money. He could not find out what land was levied upon. May have been present when land was sold—did not know when it was sold—he is deaf. Told them if it was the land on which Buryer was living it was his land. Osborn swore that he bought the land at sheriff's sale, paid two hundred and five dollars for it—that Elder was present at the sale standing within a few feet of the sheriff when the land was being sold and defendant was bidding for the same—was near enough to see and hear what was going on and was perfectly silent—he interposed no objection to the sale, before the sale nor until the same was by sheriff's deed conveyed to witness. He knew nothing of his (Elder's) claim to the land, but believed it was the property of M. O. Elder, the defendant in *fi. fa.* He bought in good faith and had no notice of any kind from anybody of any defect in the title.

Osborn also proved by the sheriff who sold the land that Elder called on him the morning of the sale and before the land was sold, and asked him if he was going to sell any and what land. He did not know as he had not made the levy, when Elder said if it was the land on which Buryer lived on it was his land, and wanted witness to tell him when he got ready to put the land up, which witness

agreed to do, knowing that Elder could not hear very well. When the sale occurred Elder was near by, within a few feet of witness, and he read aloud the advertisement—he thinks Elder heard it—was looking at witness when he read the advertisement and cried the sale. He is satisfied Elder heard it.

Other evidence of a contradictory nature was submitted as to the title of Elder from his father and its *bona fides*, not here important to the adjudication of the questions involved.

The judge, among other things, charged the jury that if Elder, the plaintiff in ejectment, stood silently by on the day of sale and permitted Osborn to purchase the property in dispute without disclosing his title, he, Elder, would not be guilty of such a fraud as would estop him from subsequently setting up his title against Osborn, unless the sheriff had authority to sell. He further charged, that in order to bind Elder, he must have done some act that mislead Osborn and induced him to purchase the property.

The judge in a note to the charge says: "the above recitals of the charge of the court are incorrect. In the first place, the court charged the jury that the levy in this case was void and there could be no legal sale under such pretended levy, and that the plaintiff would be entitled to recover unless his conduct at the sale had been such as to estop him from now asserting his title. The court further charged the jury that the purchaser at a judicial sale was bound to see that the officer had authority to sell; that an essential part of this authority was the levy or seizure, which in the case of real estate was the officer's entry of levy, since that was the only levy or seizure of which the subject matter was capable, and if the officer did not have authority to sell, the mere presence of the plaintiff at the sale, and the fact that he did not assert his title and forbid persons from bidding, would not estop him from asserting his title in this action

against the purchaser at said sale, unless he had done something to prevent the purchaser from looking into the authority of the sheriff to sell, or his conduct had been such as to mislead the purchaser on *this point* and induce him not to make the investigation as to the sheriff's authority, which otherwise he would be bound to make.

Upon the foregoing evidence and charge of the court the jury found a verdict for the plaintiff.

The plaintiff in error made a motion for a new trial upon the grounds that the court erred in charging the jury that the levy was void and charging the foregoing as the law of the case.

1. We are of opinion the levy was too uncertain—in fact was no levy in legal contemplation, and that the court committed no error in so charging.

2. In reference to the rulings of the judge in the remainder of the charge we are not able to arrive at the conclusion in said charge as to the doctrine of estoppel. The decision of the judge seems to rest upon the fact that the levy in the case was void, and the purchaser was bound by the maxim of *caveat emptor*—that if the levy had been a sufficient one and the plaintiff had induced the purchaser to invest his money, then he would have been estopped, but the same conduct on the part of the plaintiff at a sale under a void levy and by which a purchaser was deceived and misled would not estop him except where the fraud prevented inquiry as to the authority of the sheriff to make a valid judicial sale. We think the distinction of the judge as to acts and conduct amounting to estoppel, between void, voidable, and valid sales, does not exist except perhaps as to such sales as are contrary to public policy and adhorrent to law, such as for usury, etc., but the principle that a man shall not be allowed to assert a contrary right to one who by *his* acts or omissions has been induced to change his circumstances without fault, and being induced so to do by the other, applies to all sales, and this whether without such conduct the purchaser would obtain a good or bad title.

When Elder sought to recover this land from Osborn upon the title he exhibited, it was competent to show that Osborn was misled by the plaintiff and changed his situation, invested \$205.00 in good faith—and if he showed that fact, then Elder could not assert the contrary, and whether Osborn had a valid title to the land, or whether the sale was good or void, was immaterial to maintain his possession against another title now sought to be enforced by Elder. His possession was quite sufficient to protect him from a recovery by Elder if his silence and conduct at the sale amounted to fraud.

We conceive that mere personal silence when an act is about to be performed affecting rights would be less convincing than an authority or positive consent to the doing, but neither would create an estoppel unless fraud was an element and both would not in the absence of fraud.

The direction of the court confined the estoppel to the knowledge of the purchaser as to the legality of the sale and the conduct of the said Elder in misleading Osborn upon the authority of the sheriff to sell, and excluded from the consideration of the jury whether (considering the sale to be void), the conduct of Elder, his presence and silence induced Osborn to purchase to such an extent that it was a fraud upon him to assert the contrary, and if so then he was estopped, otherwise he was not.

We reverse the ruling of the court on its charge to the jury and grant a new trial. See Rorer on Judicial Sales, pages 193, 457.

Judgment reversed.

## SHACKLEFORD vs. HOOPER et ux.

1. Where a judgment was rendered in favor of "R. P. Hooper and his wife, for the use of L. P. Hooper," a *fi. fa.* in favor of "R. P. Hooper and Louisa P. Hooper" did not follow the judgment, and was illegal.
2. Recitals in a deed under a tax sale are *prima facie* evidence of the acts of the officer who made the sale—such as the advertisement, place, manner of sale, etc., but not as to the authority to sell.
3. Whilst excessive levies are not to be made, yet the mere fact that property sold for taxes did not bring its value will not raise a legal presumption that the sale was void.

Execution. Judgment. Deed. Evidence. Presumption. Tax. Levy and sale. Before Judge WRIGHT. Dougherty Superior Court. April Term, 1880.

A *fi. fa.* in favor of "R. P. Hooper and Louisa P. Hooper" was levied on certain land as the property of Shackleford, and he interposed a claim on behalf of his wife and children. This claim was based on a tax sale against the defendant, at which his wife bought. The deed recited the levy under a tax *fi. fa.*, advertisement, offering the land in parcels, sale, etc. It appeared that the land only brought the amount of taxes and costs, although it was worth much more. Under the charge of the court, the jury found the property subject. Claimant moved for a new trial on the following, among other grounds:

(1). Because the verdict was contrary to law and the evidence.

(2). Because the court refused to dismiss the levy and reject the *fi. fa.*, it appearing that the *fi. fa.* was in favor of R. P. Hooper and Louisa P. Hooper, and the judgment was in favor of R. P. Hooper and his wife, for the use of L. P. Hooper.

(3). Because the court erred in charging the jury as follows in reference to the tax sale: "it is necessary to

show that it was levied upon, it is necessary to show that it was advertised. \* \* \* If it is a considerable amount of property for a small debt, it must appear that it was offered in parcels, and I charge you that the recitals in the sheriff's deed will not be evidence of that fact. It must appear from other evidence.

"I charge you further, that a tax sale of a large amount of property greatly disproportioned to the amount that the property brought and with the amount of the taxes due, the law presumes it to be null and void, and it is incumbent upon the party who claims under the tax sale to show that it was a *bona fide* sale and made in terms of the law. If that fact appears to you from the evidence, that a large amount of property was sold, largely disproportionate to the amount of the *fi. fa.*, the amount it was sold for at the sale, the law presumes that sale a fraudulent sale, and the *onus* is upon the party who seeks a benefit under that sale to show its fairness and legality."

The motion was overruled, and claimant excepted.

D. A. VASON, for plaintiff in error.

D. H. POPE, for defendants.

CRAWFORD, Justice.

The record in this case presents several questions for our judgment:

1. Where a judgment is rendered in favor of R. P. Hooper and his wife, for the use of L. P. Hooper, and the *fi. fa.* issued thereon is in favor of R. P. Hooper and Louisa P. Hooper, is that such a material variance as to render it illegal?

This suit was brought and this judgment was rendered for the benefit of the usee, L. P. Hooper, who is the real plaintiff in the case, and the real party at interest; shall, therefore, that character be maintained from the commencement of the action up to and including the judg-

ment and then dropped when the final process is reached? We think not. If it were material in the beginning, it becomes none the less so in the ending, and it should have been preserved. Code, §3636.

The name of a nominal party may be stricken, and if a legal right remain in the usee the action may be continued. 56 Ga., 554; 59 Ga., 644. But in no case does it appear that the usee may have his rights impaired by omitting to preserve his legal relation to the same.

2. The next question made is, whether the recitals in a tax deed are not prima evidence to support the same.

That would depend in our judgment upon what the recitals were. To say that all the recitals in such a deed would be good, would be to commit the rights of parties to the hands of many very unskilled and unlearned men; on the other hand, to say that none were good would be to change what we understand to have been the rulings of this court.

Our judgment therefore is, that they are *prima* evidence of the acts of the officer himself, such for instance as the advertisement, place, hours of, and manner of sale, but the authority to sell stands upon a different footing and must be proven. 53 Ga., 455; 55 *Ib.*, 573.

3. Another assignment of error is the charge of the judge, that if at a tax sale a large amount of property is sold, disproportionate in value to the amount of taxes due and the amount for which it sells, then the law presumes it to be null and void, and it is incumbent on the party claiming under it, to show that it was a *bona fide* sale and made in terms of the law.

Whilst it has been the purpose of this court to prevent and restrain officers of this class from gross, wanton and excessive levies upon property for taxes, yet we cannot find where the rule of law laid down here has been carried to the extent stated by the judge below. The value of property sold for taxes in a large majority of cases, must

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Duckett vs. The State.

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of necessity far exceed the amount of the *fi. fa.*, or even the amount for which the same is sold. There are but few instances where such property at these sales brings more than the taxes due and the accompanying costs, so that to hold that the law pursumes all such sales null and void, would be extending the principle beyond the limits of the law, and this we cannot do.

The other questions made are unimportant in the view which we have taken of this case.

Judgment reversed.

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DUCKETT vs. THE STATE OF GEORGIA.

1. That a horse was stolen, and a few days thereafter the defendant sold it some miles away, and made false statements as to the ownership and possession thereof, was sufficient to support a verdict of guilty of larceny.
2. Where an important fact was brought to the attention of the solicitor-general for the first time by the statement of the prisoner, there was no error in permitting him to reopen the case to show that fact.

Criminal law. Practice in the Superior Court. Before Judge MCCUTCHEN. Murray Superior Court. February Term, 1880.

Reported in the decision.

LUFFMAN & HARRIS; JOHNSON & McCAMY, for plaintiff in error.

A. T. HACKETT, solicitor-general, for the state.

JACKSON, Chief Justice.

The defendant being found guilty of simple larceny in stealing a horse, moved for a new trial on two grounds, the first of which is that the verdict is not sustained by the evidence. The facts are that the



horse was taken from the pasture where the prosecutor put him at night, and that defendant sold him at Chattanooga within a day or two afterwards, and said to the purchaser that he got him from his brother who lived in Murray county, Georgia—that he, defendant, had the horse about one month, and his brother about a year—that defendant lived in three miles of the pasture and knew all about the ownership of the horse, having often seen the owner working him. This evidence is abundant to authorize the conviction of the defendant.

The second ground is that the court erred in permitting the solicitor-general to recall a witness and prove a fact called to his attention for the first time by the prisoner's statement and in rebuttal of that statement. The testimony is in rebuttal, and if it was not, the court was right to reopen the case for an important fact to be proven on either side newly discovered by counsel, even after the argument had commenced, the status of the parties not being changed by the discharge of witnesses, or other action taken by reason of the formal closing the testimony. The ground of objection to its introduction urged before this court was that the evidence did not rebut the statement. We think it does rebut it; but if not, it was not error to admit it.

Judgment affirmed.

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#### STILES *vs.* THE ATLANTA & WEST POINT RAILROAD.

Where defendant's passenger train was temporarily stopped some distance from the depot for receiving and delivering passengers until two freight trains in advance of it could be moved out of the way, and the plaintiff boarded such train in search of his wife and child, who were thereon as passengers, and in attempting to move from one car to another, by passing around an intervening car, stepped off the platform into a culvert fifteen or twenty feet deep, which he could not see on account of the darkness of the night, thereby sustaining serious personal injury, the company was not liable there-

for, even though the lights in some of the cars had been blown out by drunken and disorderly men. The exercise of ordinary care on the part of the plaintiff would have avoided the injury.

Railroads. Negligence. Before Judge BUCHANAN.  
Troup Superior Court. May Term, 1880.

Reported in the opinion.

FERRELL & LONGLEY; BIGHAM & WHITAKER, for  
plaintiff in error.

COX & SPEER, for defendant.

HAWKINS, Justice.

C. A. Stiles brought his action for damages against the defendant, the Atlanta and West Point Railroad Company, in Troup county, on the twenty-seventh day of October, 1879. He claimed \$15,000.00 damages, and alleged in his declaration that on the twenty-second day of August, 1879, at the depot of defendant, in LaGrange, Georgia, in said county, he bought a ticket for his wife and child, only four years old, to be conveyed to the city of Atlanta and return on said day. He put his wife and child aboard said train, and was then informed by the officers in charge of the same, that said train would return the night following said day, and which did return as stated, with Pierce Mims as the conductor, about twelve o'clock on said night, and instead of pulling up to the usual place of receiving and discharging passengers on the south side of the depot in said city, the train, by order of said conductor, stopped at the north of said depot. He boarded said train in search of his wife and child, and passing through said car without finding them, passed into the next ladies' car, which was crowded with ladies and children, and in which there was no light. The night was very dark. Petitioner passed nearly half way through said car, and on inquiry found his wife not

there. To keep off the children, he retraced his steps to go on the next car, not knowing that defendant had stopped its car immediately over an open culvert twenty feet deep. In descending from the steps he fell in the culvert, inflicting serious injuries, etc. He had no knowledge of the existence of the culvert at the time. By reason of said injuries he suffered great pain, was permanently injured, and, as a physician, deprived of the power to pursue his profession.

To this action defendant pleaded not guilty, and that the injury was caused, not by any negligence of the defendant, but by the gross imprudence and negligence of the plaintiff.

A trial resulted in a verdict of one thousand dollars for the plaintiff.

The evidence was, in substance, about as follows:

The defendant advertised an excursion trip to Atlanta on the twenty-second day of August, 1879, and return. The plaintiff bought tickets for his wife and child four years old, and in the morning assisted them on board the excursion train bound for Atlanta. The train consisted of many coaches and a great crowd of passengers. On the return trip the train was much crowded with men, women and children, and many of the men were drunk. The train was delayed on its return, near the depot (some 360 yards) at LaGrange. The night was warm, drizzling and very dark when the train reached a place on its track 360 yards from the depot and platform where passengers were discharged and received. It was stopped by the officer in charge of the train on account of two freight trains in front discharging freights being on the track, thereby preventing further movement of the excursion train until the freight trains were moved. Under the steps of one of the passenger coaches was an open culvert twenty feet deep, constructed and used in the ordinary way by said railroad company. Plaintiff went to the depot to meet his wife and child and be their escort from thence home.

The train was delayed, and finding that the train containing his wife and child was standing in the rear of the freight trains, and they were still delivering freights, being anxious about his wife and child, and seeing many persons coming from said train, he went up the railroad track to where said train was standing, and boarded the train in search of his wife and child, went through one car, then on through another; lights in first car, none in second. Inquired for his wife, and was told she was not in that car; retraced his steps, went down steps of the car, stepped off bottom step and fell into the open culvert fifteen feet deep, receiving severe injuries, etc. Did not go on the excursion; knew where the depot and platform was where passengers were received and discharged; wife and child not hurt; no one hurt on train, and nothing unusual or exciting had occurred.

The evidence also showed that the train on its return was much crowded, many drunken men on board the same, who blew out the lights; the train was provided with lamps and candles; the night was warm, and though all efforts were made to keep the windows down and lights burning, they were constantly blown out by drunken men and the wind.

The evidence also showed that when the train stopped the conductor cried out to passengers, "Don't get out, we are not at the depot yet." One witness said some one said get out, but the plaintiff did not hear that.

After verdict for plaintiff for \$1,000.00, a motion was made by the railroad company for a new trial upon the ground that there was no sufficient evidence to support it, and various other grounds.

The judge granted the new trial upon the sole ground that the evidence was not sufficient in law to sustain the verdict, and, therefore, the same was contrary to law, and this is the error complained of by the plaintiff.

It is written in our law that a carrier of passengers is

bound to "extraordinary diligence in behalf of himself and his agents to protect the persons and lives of his passengers." See Code, section 2067.

"Extraordinary diligence is that extreme care and caution which every prudent and thoughtful person uses in securing and preserving their own property." Section 206e.

"A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotive or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that these agents have exercised all ordinary and reasonable care and diligence—the presumption in all cases being against the company." See Code, section 3033.

What constitutes extraordinary diligence and ordinary care are questions of fact, often complicated and involved in intricate and subtle discriminations, determinable alone by the searching analysis of intelligent jurors. Here our law leaves the question under well established rules of law.

But our law does not make a railroad corporation liable for the negligence, want of care, or recklessness of other persons. No one can recover damages from another for an accident or an injury caused by his own negligence.

Code, section 3034, provides that no person shall recover damages from a railroad company for injury to himself, or his property, where the same is done by his consent, or is caused by his own negligence; and if the complainant and the company be both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him.

In construing these sections of our Code as enactments *in pari materia*, it would seem that no action can be main-

tained against a railroad company where the plaintiff could have avoided the injury complained of by the exercise of ordinary care, see Code, section 2972, and this would be true although contributory negligence on the part of the company would be an element in the case, that is to say, where the injury complained of was caused by the negligent running of the locomotive or cars of the company. Yet if the plaintiff consented to the same, or was injured by his own negligence, or could have avoided the injury by ordinary care, then he could not recover upon a well settled principle of right and law that no person ought to be mulcted in damages by the fault, negligence, or recklessness of another.

In this case it appears that the plaintiff went to the depot at LaGrange to meet his wife and child on the return of the excursion train. Finding the train some three hundred and sixty yards below the depot, he went thither, boarded the train and, in search of his wife, stepped from the cars into the culvert, receiving the injury.

It may be conceived that when at the depot at LaGrange to meet his wife and child, the plaintiff had all the rights of a passenger aboard the train for the purpose of receiving and assisting his wife and child from the train, and any injury received *there* and in the duty or desire of assisting his wife and child from the train, would be redressable at law in the absence of negligence on his part. But when he left the depot and place for delivery of passengers, and went on and up the track of defendant in the dark to meet his wife and child, and whilst the machinery of the defendant was absolutely still and not in motion, and entered the train in search of his wife and child, and while so looking for her stepped from the cars into the culvert, receiving the injury complained of, we cannot see how the defendant can be liable for this apparent accident. His desire to meet and assist his wife and child was praiseworthy, but in no sense could the defendant be charged with responsibility as to his movements in

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Rivers vs. The City Council of Augusta.

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approaching, entering or leaving its train, then not in motion and only awaiting the removal of the freight trains to deliver the passengers at the depot.

The court below thought the evidence did not authorize the verdict, and we see no abuse of its discretion in granting the new trial.

Judgment affirmed.

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RIVERS vs. THE CITY COUNCIL OF AUGUSTA.

1. A municipal corporation is not liable for damages resulting from a failure on the part of its council to perform, or an improper performance of those powers and duties which are legislative or judicial in their character. For damages resulting from neglecting to perform, or negligence in the performance of those duties which are purely ministerial, it would be liable.
2. There is no sound distinction as to such liability between a failure to pass an ordinance in the first instance and its repeal or suspension after being passed. Therefore, where a city council passed an ordinance forbidding the running at large of cattle in its streets, but subsequently suspended its operation indefinitely, on the ground, among others, that the growth of weeds and grass was too luxuriant for comfort, health and good appearance, one who was gored by a cow running at large in the streets would not have a cause of action against the city.
  - (a.) Nor would the principle be altered by the fact that the owner paid a municipal tax on the cow.

Municipal corporations. Damages. Actions. Before Judge SNEAD. Richmond Superior Court. April Term, 1880.

Reported in the decision.

D. F. MYERS; W. K. MILLER; FRANK H. MILLER,  
for plaintiff in error.

W. & T. H. GIBSON; FOSTER & LAMAR, for defendant.

CRAWFORD, Justice.

Mary P. Rivers, a minor child, whilst walking on the sidewalk of one of the streets in the city of Augusta, was set upon and seriously gored by a cow which was running at large in the streets of that city. For the damages which she sustained by reason of this misfortune she brought suit against the corporation.

The allegations were substantially, that under its statutory authority, it had power to pass all ordinances, rules and regulations necessary for the good government, health and safety of the property and persons in said city, and to establish such respecting the streets and sidewalks as to keep them in a safe condition for the use of its citizens, as well as power to abate all nuisances that existed therein. That in 1878 cattle were forbidden the use of the open streets within certain named districts in the city, but that this ordinance was afterwards suspended indefinitely. That by virtue of its police power it was the duty of the city to keep the public streets in a safe condition for travel and the use of its citizens, but being unmindful and neglectful of this duty, did not keep cattle from straying therein, and permitted them to do so without attempting to prevent it. By means whereof the plaintiff, without fault on her part, was injured and damaged by a cow, the property of one Hanson who had paid taxes to the defendant upon her, with its knowledge that she was to be kept within the limits of the city, and roam through its streets at will. That this system of allowing cattle the use of the streets was not reasonably calculated to insure the safety of the people, yet in consideration of the taxes paid the same was permitted, the defendant thereby undertaking to protect the citizens, but which it has failed to do.

To this declaration a demurrer was filed, which was sustained by the court, and the plaintiff excepted.

1. By this writ of error we are brought for the first time



in this state to rule upon the *direct principle* invoked as law in this case.

It is undoubtedly the duty of law-makers to provide for the safety of the persons whose protection is committed to their care, but there are injuries which law cannot prevent, and for which parties suffering cannot recover. Calamities and accidents are common to all, but because they occur, it by no means follows that such as may be so unfortunate are entitled to recover compensation in damages out of some person, either natural or artificial, who may be able to respond, notwithstanding it appears that such impressions are beginning largely to prevail. Casualties, the result of misfortune, or one's own negligence and not that of another, are *damnum absque injuria*.

In the case before us the City of Augusta having the right to pass all laws and ordinances necessary and proper for its government, is charged with liability in damages for injuries suffered by the plaintiff, because of its negligence in allowing cattle to run upon its streets, accepting a consideration therefor in the way of taxes, and this after the exercise of their right to prohibit it; and especially because in suspending this ordinance one of the reasons stated in the preamble was the too luxuriant growth of the weeds and grass for the health, comfort and good appearance of the city.

The powers and duties of the City Council of Augusta, under its charter, consist in acts which are legislative or judicial in their nature, and those which are purely ministerial. For a failure to perform the first, or for errors of judgment committed in their performance, the corporation is not responsible, because they are deemed to be but the exercise of a part of the state's power, and, therefore, under the same immunity.

The rule, however, for the last is different, as damages may be recovered either from the neglect to perform them, or from performing them in an unskilful, negligent,

proper manner. Thompson on Neg., vol 2, 731; 445; 9 N. Y., 459; 1 Sanford, S. C., N. Y., 465. The adoption of an ordinance in reference to allowing to run at large in the city, is one which is wholly legislative, and therefore discretionary. It is not liable for damages for neglecting, omitting or refusing to notice the subject, or having noticed it, and adopted an ordinance concerning it, then to repeal or suspend it instantly. 2 Dillon Mun. Cor., §753.

It is, as well as all other matters involving municipal legislation, must depend upon the judgment and wisdom of the council, according to its view of the public necessity or advantage; being an *imperium in imperio*, they can lay no foundation for damages resulting from erroneous conclusions, and this seems to be the unbroken rule of the authorities on the subject.

But it was insisted on the argument that so long as a municipality fails to legislate it is not liable, but when it does, it is liable for damages accrues. We are unable to appreciate this difference.

In the case of Hill vs. Board of Aldermen of Charlotte, reported in 21 Am. Rep., 451, ruled directly upon a similar point. An ordinance prohibiting the use or exhibition of fire-works was passed, remained of force two or three years, was then suspended from the twenty-fifth day of December to January 1st inclusive, during which time the firing off of squibbs, fire-crackers, and Roman candles, the plaintiff's house was burned, for which loss he brought suit against the city.

It is held, that it was within the discretion of the authorities to determine, from time to time, what ordinances were proper, and that the corporation was not liable to the plaintiff for the destruction of his property.

To hold a municipal corporation after legislation, liable for all damages which might occur in connection with the subject matter thereof, would be contrary to precedent

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The Rockdale Paper Mills *vs.* Stevens.

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and authority. Nor would the collection of a tax required by such legislation enlarge the right claimed.

To say that the exercise of the discretionary power by the council would preclude the city from the repeal of an ordinance without leaving behind it a liability for damages, appears to us unsupported by authority. It is true that there are many acts which are discretionary, and may or may not be done; as for instance, to open streets, grade sidewalks, dig sewers, build a bridge, provide water, and many other things for a failure to do which no action lies, how much soever private interests may suffer; yet when the discretion is used, and the work is done, if done so negligently, or unskilfully as to damage other parties, then a right of action lies. But in no case, for the simple exercise of the power itself, disconnected from its negligent or unskilful execution, is the corporation responsible. We think, therefore, that the ruling of the judge below was right and must be sustained.

Judgment affirmed.

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THE ROCKDALE PAPER MILLS *vs.* STEVENS.

1. Although a non-suit may have been improperly refused at the time the motion therefor was made, yet if the proof necessary to make out the plaintiff's case was afterwards supplied, a new trial will not be granted on that ground.
2. An error which did no injury will not necessitate a new trial.
3. That one of the counsel for the plaintiff was talking about the case on trial in a public place, and without his knowledge a member of the jury near by heard him say that he had been down three or four times about these cases, and hoped he would get through with them, is not ground for a new trial.
4. The verdict is for a principal larger than the note sued on. It is directed that the excessive amount be written off, or a new trial be granted. Costs are awarded against the defendant in error.

Non-suit. Verdict. Jurors. New trial. Before Judge SPEER. Rockdale Superior Court. February Term, 1880.

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The Rockdale Paper Mills vs. Stevens.

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Stevens brought complaint against the Rockdale Paper  
on the following note :

One day after date I promise to pay to John Stevens, or bearer, five  
dollars and eleven dollars and twenty-four cents for labor, with  
interest at one per cent. per month. February 10th, 1875.

(Signed)

"B. N. MCNIGHT, *Agent*,

Per A. H. ZACHRY."

There were certain credits on the note, not material

The defendant pleaded the general issue and recoup-  
ment. The latter plea was to the effect that Stevens was  
employed by the defendant as foreman or superintendent  
of his works, and the note was given for his wages; that  
Stevens failed to comply with his contract, and by his unskillful  
conduct caused damage to defendant. On the trial plain-  
tiff introduced the note, and defendant admitted that it was  
given to Stevens by its agent, McNight, for services.  
Defendant moved for a non-suit, which was refused. It  
was then shown that McNight was the agent of the  
defendant, and Zachry its sub-agent. On the subject of  
recoupment the evidence was conflicting.  
The jury found for the plaintiff \$516.18 principal. De-  
fendant moved for a new trial on the following, among  
other grounds :

1. Because the verdict was contrary to law and the  
evidence.

2. Because the court admitted the note in evidence.

3. Because the court overruled the motion for a non-

4. Because one of counsel for plaintiff during the  
hearing talked about the case in the hearing of a juror. [In  
reference to this ground, it appeared from the affidavits used  
in the hearing of the motion, that pending the trial, while  
at the hotel, one of plaintiff's counsel was asked some ques-  
tions about the case, and this led to his making several  
remarks about it. Without his knowledge, a member of  
the jury was in the same room, a short distance off; but

all he heard of the conversation in regard to the case was a remark of counsel that he had been down three or four times about these cases, and hoped he would get through with them.]

The motion was overruled, and defendant excepted.

A. C. MCCALLA; A. A. ZACHRY; GEO. W. GLEATON,  
for plaintiff in error.

GOBER & LESTER, for defendant.

JACKSON, Chief Justice.

This cause came before the superior court as a suit brought on a promissory note, whereupon the jury found for the plaintiff, a motion was made for a new trial, it was denied defendant, and it excepted.

1. The first ground is that the court erred in admitting the note in evidence, and in refusing to non-suit the plaintiff. It would have been better, perhaps, if the court had required proof that the person who signed the note was the agent of the Rockdale Paper Mills Company—the same being signed only by a person as agent and not designating for whom he was agent—and for want of that proof to have non-suited the plaintiff; but the proof was supplied afterwards during the trial, and if there be any error it did not hurt. Besides, the plea admitted that the note was the note of the company, and no issue was made on that point.

2. The plea of recoupment was filed, and the jury found thereon against the defendant, and the next assignment of error is that the verdict is not supported by evidence, and is contrary to law. It is abundantly supported. The entire defense looks like an afterthought. The note was given for services in 1874, and payments were made thereon up to December, 1877, and four of these payments were acknowledged in the plea to have been made

the knowledge of the alleged bad work of the plaintiff. This bad work was done not in 1874, but in 1875 or 1876. Besides, the plaintiff alleged and testified that the bad work was in the defendant's machinery, and the jury had no right to believe him. There were also letters from the defendant's agent looking to the payment of the note, and the defendant acknowledging its validity just before the suit was brought.

The affidavits fail to show any improper conduct of the plaintiff's counsel in talking in presence of the jury, or that any of them heard one word which could have influenced the verdict, and where such is the case, it would have been gross error to grant a new trial.

The verdict, however, is wrong in that the principal found by the jury exceeds the amount of the note, and a new trial must be awarded unless the plaintiff will let the court strike off the principal down to the proper sum. The note is for \$511.24, and the verdict is for \$516.18 as principal. The defendant insists that a right calculation will reduce the principal even below the face of the note if the credits on the note are all allowed, and the interest is all extinguished, and the overplus of payment applied to the principal. Let the calculation be made, and the plaintiff correct the judgment accordingly, in which case the judgment will be affirmed; otherwise, it must be reversed.

In either event the costs of bringing the case to this court must be paid by the defendant in error, inasmuch as the plaintiff in error was constrained to bring the case to court to have a manifest, though in amount a very small, injustice to it corrected.

Judgment affirmed on terms.

The Commissioners of Floyd County *vs.* Black.

THE COMMISSIONERS OF FLOYD COUNTY *vs.* BLACK

[Jackson, Justice, was providentially prevented from presiding in this case.]

Witnesses attending committing trials under subpœna in counties other than of their residence, are not entitled to \$2.00 per day for such service. Such compensation is only allowed them for attendance upon the superior court.

Criminal law. Costs. Witness. Before Judge UNDERWOOD. Floyd Superior Court. March Term, 1880.

Reported in the opinion.

HALSTED SMITH; D. B. HAMILTON, for plaintiffs  
error.

J. BRANHAM, for defendant.

HAWKINS, Justice.

On the third day of December, 1878, J. R. Towers, justice of the peace, issued a subpœna, as follows: .

"GEORGIA—Floyd county:

"To James Blount, of said county, greeting: You are hereby commanded that, laying all other business aside, you be and appear at the justice court of the 919th district, to be held in and for said county, on the fifth day of December instant, by 10 o'clock A. M., at the court-house, then and there to be sworn as a witness for the state in the case of the State *vs.* J. R. Cooper and C. C. Ellis, in an action of murder in said court pending. Herein fail not under the penalty of the law.

"December 3d, 1878.

[Signed]

J. R. JONES,  
N. P. and ex-officio justice, etc."

On the back was indorsed the affidavit of Blount that he attended court three days, and resided out of the county, dated December 9th, 1878, at \$2.00 per day; approved by J. W. Underwood, judge superior court, and paid by the tax collector on the same day.

Suit was brought in the justice court for the 919th dist by Black, the tax collector, against the county of Floyd, for the said sum of \$6.00, on said subpœna transferred to the said Black, and judgment rendered without evidence but on the subpœna so transferred, from which judgment a *certiorari* was sued out, and the judge, on the hearing, overruled the *certiorari*, and gave judgment for the plaintiff, to which decision the county of Floyd excepts. This is the only error, no point being made that a *certiorari* was not the proper remedy.

We know of no law allowing compensation to witnesses in other counties attending courts of inquiry on commitment trials.

There is a law allowing \$2.00 per day for witnesses for the state, in attending the trial of criminal cases in the superior court, residing without the county. In the absence of legislation authorizing it, we hold that the witness was not entitled to the \$2.00 per day in attending commitment trial for the crime of murder. If the witness had been required to appear at the superior court to give evidence on the trial there, or before the grand jury, and had appeared in obedience to a subpœna, he would have been entitled to \$2.00 per day for each day he attended, and the like amount for every thirty miles going and returning from the court. The county of Floyd, in our opinion, is not liable to the plaintiff for the \$6.00 demanded, and therefore the judgment of the court below must be reversed.

Judgment reversed.



TILLMAN *et al* vs. MORTON.

1. A plea of set-off should plainly set forth the liability claimed to exist on the part of the plaintiff. An averment that plaintiff is indebted to defendants for money "placed in his hands, December 27th, 1876," is not sufficient.
- (a) Nor is it aided by an amendment which states that the sum claimed was paid by one of the defendants to plaintiff on a promissory note, not knowing it to be without consideration. It should state how such note was without consideration, and how the defendant was ignorant thereof.
2. A plea of usury should distinctly set out the usury, its amount, date and time.
- (a) Where interest on a certain sum is due and payable by contract at a specified time, on failure to make such payment, interest accrues on the amount so due.

Pleadings. Set-off. Interest and usury. Before Judge  
HANSELL. Brooks Superior Court. May Term, 1880.

Reported in the decision.

W. C. MCCALL, by brief, for plaintiffs in error.

H. G. TURNER, by brief, for defendant.

CRAWFORD, Justice.

This suit originated on a promissory note, and to which were filed pleas of set-off and usury. Upon the trial of the case both the pleas were stricken for insufficiency and that judgment is the error alleged to have been committed.

1. The plea of set-off avers that the plaintiff is indebted to the defendants in the sum of \$2,989.54 placed in his hands December 27th, 1876, and out of which the defendants offer to set-off the plaintiff's claim. This being a cross-action the liability on the part of the plaintiff to pay should be plainly and distinctly set forth, otherwise it is demurrable. To say that the sum of money sued for

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McElroy vs. The City Council of Albany.

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was placed in his hands December 27th, 1876," with no averment, does not show a liability upon which a judgment can be rendered, and the plea was therefore properly stricken as being vague and uncertain.

An amendment to the plea of set-off was offered, averring that the note was without consideration, and that the said sum of money was paid by Tillman, not owing it to be without consideration. The plea as amended not being legal was also stricken, and we think properly. How a promissory note should be without consideration, and that fact unknown to the maker, should have been shown by the plea, and made issuable, to enable the defendants to have been heard upon it either on an amendment or an original plea.

2. The other error complained of is that the plea of usury was also stricken. It avers "that two hundred dollars of the said note is interest, which said sum was added to the face of said note for the use of the amount borrowed from the plaintiff for one year. These defendants say that no interest is due to plaintiff upon the said two hundred dollars." A plea should be complete and perfect in itself, and if it be a plea of usury, then it should set out the usury, its amount, its dates, and time. But even had it been set out as indicated, under the ruling of this court in 61 *Ga.*, 275, it would still have been the duty of the court to have stricken it.

Judgment affirmed.

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#### MC ELROY vs. THE CITY COUNCIL OF ALBANY.

Municipal corporation is not liable for the torts of its police officers; especially is this the case when the tort was not done in connection with his official duties.

Municipal corporations. Torts. Damages. Principal and agent. Before Judge WRIGHT. Dougherty Superior Court. April Term, 1880.

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McElroy vs. The City Council of Albany.

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McElroy sued the City Council of Albany, alleging in brief as follows:

On the third day of August, 1878, while peaceably and quietly walking along one of the public streets of the city of Albany, about eleven o'clock at night, he was seized by a watchman (a servant in the employment of said city, authorized by said city to arrest persons), who in the discharge of his duties as night-watch, and violently thrown down on the sidewalk, having his leg fractured and broken. At the time this was done said *quasi* policeman or night-watchman was drunk. By said injury said plaintiff was damaged three thousand dollars. Said City Council was at the time informed of the drunkenness of said night-watch, and the injuries received by plaintiff, and sanctioned and approved of his conduct by retaining him in office and in its employment until the expiration of his term of office or employment. The injury accrued from said City Council having employed a drunken, disorderly, indiscreet night-watch, and continuing him in its employment after it was apprised of his character.

On demurrer, the case was dismissed, and plaintiff excepted.

H. MORGAN; L. ARNHEIM, for plaintiff in error.

WOOTEN & JONES, for defendant.

JACKSON, Chief Justice.

This was a demurrer to the plaintiff's declaration; the demurrer was sustained and the suit dismissed, and error is assigned thereon.

The substance of the allegation in the declaration is that a city watchman, *quasi* a policeman, wilfully and maliciously, while drunk, threw the plaintiff down and broke his leg; and the question is, can the plaintiff recover from the city in such a case?

Without going into the question so elaborately and argued by counsel for the plaintiff in error, as respects liability of municipal corporations for the misconduct of their own agents and servants for mere local duties not created by statute, as contra-distinguished from those created by statute and agents of the state as well as servants of the corporations, it is enough to say that so far as policemen are concerned, the point is settled that the corporation is not liable, in 54 *Ga.*, 468, *Cook vs. City of Macon*, though the policeman was there engaged in making an arrest, and therefore was within the scope of his agency. In the case at bar, the watchman was clothed with police powers and is called a *quasi* policeman in the declaration, and the principle ruled in 54 *Ga.* will govern his conduct on this point—the police of Macon being as much servants and agents of that corporation, for local purposes, as this watchman was for Albany in the case at bar. And here this case might rest.

But this watchman was in no sense engaged as the agent of the city of Albany in this transaction. He was attempting to make an arrest when he threw the plaintiff down and did him the serious injury, nor was he in the act of trying to do any duty for the city; but he was acting as an independent man, as principal, and not as agent for anybody. In such a case the doctrine of *pondeat superior* does not apply, because there was no superior or principal or master in the matter. *Dillon on Corp.*, 772, and cases cited. Judgment affirmed.

MUNROE *et al.* vs. PHILLIPS, administratrix.

Where in the year 1854, solvent notes were deposited with the defendant's intestate for the use of certain colored minors, by their reputed father, and the intestate shortly thereafter took out letters of guardianship for the minors as free persons of color, and managed the fund from then until early in 1864, when he invested what remained in Confederate bonds without an order of court, and on April 23d, 1878, three of said wards brought suit for their share of the fund, the eldest of whom became of age in 1863, married in 1865, and became discoverd in 1868 by the death of her husband, the second and third reaching their majority in 1871 and 1872 respectively :

*Held*, that the cause of action accrued to plaintiffs before June, 1869, and more than nine months and sixteen days having elapsed after their respective disabilities were removed before suit, the action was barred by the provisions of the act of 1869.

Statute of limitations. Before Judge WIMBERLY. Munroe vs. Phillips, Cogee Superior Court. May Adjourned Term, 1880.

On April 23, 1878, Victoria Munroe, formerly Victoria Lowe, Marian Grey, formerly Marian Lowe, Missou Overton, formerly Missouri Lowe, brought complaint against Laura Phillips, as administratrix upon the estate of Pleasant J. Phillips, deceased, for \$10,000.00. The declaration alleged that on January 1st, 1854, defendant's intestate, being the guardian of petitioners, received as such guardian from Henry Lowe, as the reputed father of petitioners, \$4,268.76 for their use, and the said intestate undertook and promised to pay them the aforesaid money when he should be thereunto afterwards requested, by the said intestate whilst in life, and the said Laura Phillips as his administratrix, since his death, although often requested, to-wit: on January 1st, 1875, hath not paid the same or any part thereof, but the same to pay hath hitherto refused, and still does refuse, to the damage of petitioners \$10,000.00. Wherefore they bring suit and pray process, etc.

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*Munroe et al. vs. Phillips, administratrix.*

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the case was tried on the declaration as above stated without amendment. The remaining facts, so far as material, are stated in the opinion.

LANDFORD & GARRARD; THORNTON & GRIMES, for plaintiffs in error.

DEABODY & BRANNON; J. M. RUSSELL, for defendant.

WALKINS, Justice.

This was an action brought in the year 1878, by Victoria Munroe and her two sisters, Missouri and Marian, against the defendant, as administratrix of P. J. Phillips, to recover a sum of money which they alleged said P. J. Phillips, her intestate, received from Henry Lowe for their use.

The declaration was in complaint, and in substance charged that Henry H. Lowe, their reputed father, in 1854, left and placed in the hands of said P. J. Phillips, a sum of \$14,000.00 in good, solvent notes on other persons, to be held for them and their brother Polk, and deceased sister, to be paid over to them on demand, which the said defendant refused to do. Polk was to receive \$10,000.00 and the others one thousand dollars each. They sue for their part, one thousand each. To this action the defendant pleads the general issue, settlement with a guardian appointed on the resignation of her intestate husband, and the statute of limitations, and that the plaintiffs were not entitled to recover. Trial was had resulting in a verdict for defendant. A writ of error was granted and the case was here by this court reversed on several grounds. It appeared that in the year 1854, Henry H. Lowe placed in the hands of Phillips good and solvent assets to the amount of \$14,000.00. That he was the father of the plaintiffs, they were negroes. The negroes were to be taken to Washington city and there emancipated, and this sum was to be paid to them, \$10,000.00

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*Munroe et al. vs. Phillips, administratrix.*

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to the boy, and one thousand dollars to each of the other two. Phillips accepted the trust, and afterwards, in 1854, obtained letters of guardianship of the plaintiffs as free persons of color, and used the assets in the support and maintenance of the wards until and during the war, when he invested what remained in Confederate bonds without the order of the judge of the superior court.

Victoria married in 1865 and became a widow by the death of her husband in 1868. Missouri and Marian were born after 1868, and while they were minors, went to Louisiana and there were married. Missouri became of age in 1870, and Marian in 1872, and Victoria arrived at majority in 1863.

The evidence showed that Phillips as guardian of the plaintiffs, free persons of color, received the property being good solvent notes, in 1854, and that he used the same for the benefit of the wards, showing a tabulated statement of the receipts and disbursements from his appointment in 1854, including all the years from that time until January, 1864.

The evidence shows that he lent out the moneys to solvent parties, and in the year 1863 or 1864, received payment of the same in Confederate money, and then funded the same in Confederate bonds, and on the first day of May, 1864 held, as the only property or effects of the wards, Confederate bonds to the amount of \$3,919. This was the whole of said estate, and the disposition thereof as made by the said Phillips, and the times of making said transactions.

In 1868 Munroe, who was the husband of Victoria, obtained letters of guardianship, and before the ordinary Phillips settled with Munroe, turning over all the assets in his hands, to-wit: the Confederate bonds, obtaining a receipt in full and a final discharge from the ordinary and resigned his guardianship.

When this case was here before, see 62 Ga., this court held, BLECKLEY, J., delivering the opinion, that the d

of Phillips before the ordinary was void, because no citation and notice was given to the next of kin. That for free persons of color there could be no resignation, that free persons of color were *non sui juris* until July, 1865, when by the constitutional amendments they were invested with all rights of citizenship, including the right to sue, &c. But that by operation of law, Phillips was converted into a general trustee, and was no longer the guardian of free persons of color in that legal sense alone; that the funding of the Confederate money being without an order of the judge of the superior court, did not protect him against a recovery for the value of the money, but under the allegations in the declaration, did not decide the question of the statute of limitations of 1869.

The case was again tried, and upon similar proof a like verdict was rendered for the defendant, and this second time on exceptions is now here for reviewing the finding of the court.

This court also held that the declaration was defective, and should be amended, setting out all the facts, so as to show when the right of action accrued, and all the actions of Phillips concerning the money and property of the plain-

There was no motion for a new trial in this case, and no amendment of the declaration.

The only question, therefore, for discussion now is, whether the plaintiffs are affected, and how, by the act of 1865, affecting contracts and causes, accruing prior to July 1, 1865? It was insisted here that this cause of action did not exist until 1868, and therefore the limitations of the Code, and not of the act of 1869, were applicable to this case, and this depends upon the simple question, when did the cause of action arise? If not till July 1, 1868, if then, these plaintiffs were not barred, for they were ten years from the removal of disabilities to bring their proper suit, but if the cause of action arose prior to



and before the first day of June, 1865, then the complainants are barred, according to the provisions of the act of 1869.

The evidence shows that Phillips, the intestate guardian, received, used and disposed of the entire estate prior to the first day of June, 1865; that he used the money and assets in the maintenance and support of the wards—collecting and loaning out the same until the year 1865, when he collected the notes then held by him as guardian, and funded the whole in two Confederate bonds or certificates therefor, and this closed his entire dealings with the wards' estate. Nothing more was done by him either in the recognition or continuation of the trust.

In 1868, Victoria's husband obtained letters of guardianship, and receipted to Phillips for the entire assets, and Phillips thereupon resigned. This court held that the proceeding before the ordinary was *void*, and did not affect the relation or liability of Phillips to his wards, and therefore the limitations prescribed by the act of 1869 would not operate. The settlement with him and the resignation of his guardianship could not be held a continuation of what did not then exist in law. Therefore, if the cause of action, which was in this case the liability for receiving the Confederate money, its value, and his funding the same in Confederate securities without the sanction of the judge of the superior court, existed prior to June 1st, 1865, they were barred, for it must be conceded that if he received the money in a legitimate way, and when other prudent men were so acting, and it being at the time the only currency of the country, the funding of the wards' money by him, and under an order of the judge, would protect from a recovery, either of the value of the money or the original securities. So that, on the other hand, his action in funding without an order rendered him liable. The right of action accrued, and all persons who were *sui juris* were, by the provisions of the act of 1869, compelled to bring their

tion on or by the first of January, 1870, or the action and the right of action should be forever barred; and the same rule applied to trustees, except where their conduct in the management of the trust funds was fraudulent.

There does not appear to be any fraudulent conduct on the part of the guardian in the administration of these assets, nor was there any motion for new trial made in this case.

The cause of action having accrued prior to the first day of June, 1865, Victoria being of age in 1863, and discovered in 1868 to first January, 1870, she is barred by the said act of 1869.

Missouri attained her majority in 1871, and had nine months and sixteen days from her majority to bring her action, and so as to Marian, who was of age in 1872.

This suit being brought in 1878, all of these plaintiffs are barred.

Whether, therefore, the law of Alabama or of Georgia prevails, whether under the act of 1866, called "the husband's law," the right of action was with the wives, or, according to the common law, the right was in the husbands, all were affected by the act of 1869, and the husbands were barred also.

This disposes of the case, and renders further consideration of the errors of the court unnecessary.

Judgment affirmed.

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DAVIS *vs.* MCMICHAEL *et al.*

Where a bill was filed in Crawford superior court by the wife against her guardian, who was also the guardian of her deceased brother, for an account of her and his estate, which went into the guardian's hands, alleging that their money had been invested in land in Upson county, where the guardian resided, and the title thereto had been taken in his name, that this was done with the aid and assistance of her husband, who was made a party defendant, and praying that the amount found to be due her individually and as

*Davis vs. McMichael et al.*

heir-at-law of her brother be decreed to be a lien upon the land, but containing no prayer against the husband :

*Held*, that the superior court of Crawford county, where the husband resided, had no jurisdiction of the case, there being no substantial relief prayed against him.

Equity. Jurisdiction. Venue. Before Judge S. MONS. Crawford Superior Court. March Term, 18

Report unnecessary.

HALL & SON; R. D. SMITH, for plaintiff in error

No appearance for defendants.

HAWKINS, Justice.

This was a bill in equity, filed in Crawford superior court, in favor of Mrs. Davis, wife of the defendant Davis, against her husband and W. J. McMichael.

It alleged that Davis resided in Crawford, and McMichael in Upson county.

The bill charged that McMichael was the guardian complainant and her deceased brother, and as such guardian had received and squandered their money and estate; that the said McMichael used means belonging to her and her deceased brother, had purchased land in the county of Upson taking the title thereto in his own name, and that her husband had aided and assisted the guardian to misapply said assets, and in the investment the same in the land aforesaid in Upson county—that both her husband and McMichael were insolvent.

She prays that an account may be had with McMichael her guardian, to ascertain the amount due her in her own right, and as heir-at-law of her deceased brother, and when so found, the same may be decreed to be a lien on the land in Upson county; and prayed such other and further relief as was equitable. At the appearance to the bill McMichael pleaded to the jurisdiction

*Summerlin et al., administrators, vs Dorsett, administrator.*

wford superior court, which the court sustained, and is the sole complaint here.

The constitution of 1877, sec. 16, par. 111, Supplement to Code, § 648, provides that equity cases shall be heard in the county where a defendant resides against whom substantial relief is prayed.

The relief sought in the case at bar is that an account be taken with her guardian, and when ascertained a decree be had creating a lien on the land in Upson county, where McMichael lived, and the land was situated, to pay her the amount so decreed out of said land. There is no relief prayed against Davis, and whether he acted in the misappropriation of the trust fund or not, the issue being in McMichael, his presence is not necessary to the enforcement of complainant's equity against her guardian and the land now sought to be reached by this proceeding.

Judgment affirmed.

*SUMMERLIN et al., administrators, vs. DORSETT, administrator.*

Will which was probated in 1857 provided a life estate in the realty for the widow of the testator; at her death certain land was to go to the children of one of testator's sons, to be managed for them by said son free from liability to account for use, etc.; the personalty (with certain exceptions) was to go to the widow to be used and controlled by her for life, and at her death to be divided among testator's children and grandchildren, in the manner pointed out. It was provided that there should be no sale of negroes for the purpose of distribution, but that the executor should divide them into as nearly equal as possible, and that the difference in equality be made up in money. In the same year the executor returned that he had \$6,454.09 cash left at the death of testator. He never divided it over, but died in 1866; his estate was unrepresented till 1866, when administration was had. In 1877 the widow of the original testator died. In 1879 his administrator *de bonis non* brought suit against the administrator of the deceased executor for money so returned:

Summerlin *et al.*, administrators, *vs.* Dorsett, administrator.

*Held*, that the declaration showed on its face that it was barred by act of 1869, and was demurrable. The will did not intend for money to be retained by the executor for purposes of equalization at the death of the widow; it was intended for that to be done in inter-payments among the distributees. The right of action accrued for the use of herself and the remaindermen, if anything should be left, prior to 1865, if she took any estate in it. If she took none, then the right of action had accrued to the legatees. In either event the suit was not brought prior to 1870, nor within twelve months and fifteen days after administration on the estate of the executor.

Wills. Administrators and executors. Statute of limitations. Before Judge BUCHANAN. Douglass Supreme Court. January Term, 1880.

Summerlin *et al.*, administrators *de bonis non* of Lazarus Summerlin, brought assumpsit, in 1879, against Dorsett, administrator of Joseph Summerlin, who had been the executor of said Lazarus. The declaration alleged substantially the facts stated in the head-note. On demurrer the court dismissed the declaration on the ground that it showed on its face that it was barred by the statute of limitations. Plaintiffs excepted.

L. H. FEATHERSTON; C. W. MABRY, for plaintiffs.  
error.

P. H. BREWSTER; J. S. JAMES; R. A. MASSEY; L. RAY; A. J. RICHARDS, for defendant.

JACKSON, Chief Justice.

This is an action of assumpsit brought by the administrators *de bonis non* with the will annexed, of Lazarus Summerlin, against the administrator of Joseph Summerlin, to collect from him a claim for six thousand five hundred and fifty-four dollars, which it is alleged came into the hands of Joseph Summerlin in 1857, as executor of the will of said Lazarus Summerlin. The declaration

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Summerlin & al., administrators, vs Dorsett, administrator.

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as demurred to because it was barred by the act of 1869; the court below sustained the demurrer, and the plaintiffs accepted.

Joseph Summerlin died in 1863, and there was no grant of letters of administration on his estate until 1876, but this action was not brought before the first day of January, 1870, or within nine months and fifteen days of the grant of those letters, and therefore if the right of action accrued to the heirs-at-law or legatees under the will of Lazarus Summerlin, for whose benefit this action is brought by the administrators *de bonis non*, arose before 1865, the action is barred by that statute and by the construction placed on that statute by this court; but if no suit could have been brought against Joseph Summerlin in his lifetime, as he died in 1863, then the suit is not barred by that act, because no cause of action arose before 1865. The question is did the legatees have the right to sue Joseph Summerlin for this money before his death?

It is insisted for the plaintiffs in error that the will of Lazarus Summerlin required the executor, Joseph Summerlin, to keep the estate together until the death of the widow, and as that took place in 1877, the right of action accrued then when the property was to be divided among the legatees—the widow to have the use of it for life—and that Joseph Summerlin was to retain this money, which he returned as in his hands in 1857, in order to equalize the shares of negroes which were to be divided at the death of the widow.

We cannot think such was the intention of the testator. So far as the lands are concerned, they were to go to the widow for life, and then to the children of Michael Summerlin, testator's son, and at the death of the widow, Michael, and not Joseph, was to manage the land for his children's benefit, schooling, etc., but without accountability to them; and as to the personal estate, that his wife was to use and control. If this money was part of that personalty, she was to have the use and control of it, and

*Dent vs. Cock.*

the executor is clothed with no power to interfere with her. When he turned it over to her the will was executed as to that money, if it went to her by the will. If he did not turn it over, she could have sued him for it, and her right of action accrued for her use and control as well as the benefit of the remaindermen, if any of it was not consumed by her. If she took no estate in the money then the other legatees could have sued, if it passed under the will, and if not the heirs at law could have sued Joseph Summerlin for it. The idea that the executor was to hold this large sum of money to equalize the shares of the negro when divided after the widow's death seems to us wholly untenable. The testator contemplated that those shares of slaves should be made equal by the legatees paying each other the differences in value of their respective shares, and not the withholding this large sum of money from his wife and children and locking it up in the hands of his executor until the widow died.

No fraud and corruption is averred against the executor so as to take the case without the act of 1869, and we are of the opinion that this is one of the cases on which the statute was intended to operate, and that the judge of the superior court did not err in holding that the action was barred, as appeared on the face of the declaration and in sustaining the demurrer and dismissing the suit.

Judgment affirmed.



DENT *vs.* COCK.

1. The age of legal majority in this state is twenty-one years. A child of less age, whether male or female, is an infant.
2. Indentures of apprenticeship during minority do not give to the master any higher rights or greater control over a female apprentice than such as the parent could legally exercise, and therefore are not void upon her arriving at the age of eighteen years, as being in restraint of her right of marriage.

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Dent vs. Cock.

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Infancy. Minors. Master and servant. Contracts.  
 before Judge BUCHANAN. Coweta Superior Court. March  
 term, 1880.

Reported in the decision.

ROBERT S. BURCH, for plaintiff in error.

DAVIS & BREWSTER, for defendant.

SAWFORD, Justice.

The single controlling question made by the record in this case is whether a county court judge has jurisdiction to cite the master of a female apprentice, who has arrived at the age of eighteen years, before him for a settlement allowance, because of the expiration by law of her term of service as such apprentice. In this case Margaret Dent has been bound to B. F. Cock for and during her minority, and claiming that she had reached her majority, sued for a citation for allowance as provided by statute in such cases, requiring him to appear before the judge of the county court for that purpose.

Upon the hearing of the said case, it was considered and adjudged that the said master do pay to his said apprentice the sum of \$50.00 and costs. To which judgment and decision a *certiorari* was granted, and when heard in the superior court the same was reversed and set aside as illegal, and that ruling is complained of as error. We concur with the circuit judge in the view which he has taken of the law, and hold that the age of legal majority in this state is twenty-one years, and until that age is reached all persons are minors.

The indentures of apprenticeship during one's minority, and until the apprentice arrives at twenty-one years of age. They do not, however, give the master any higher rights, or greater control, over a female apprentice than what the parent could legally exercise, and are, therefore, not void as being in restraint of marriage. Judgment affirmed.



## ANDERSON vs. DODD.

Whatever may have been the law prior to the Code, section 2681 declares that where a person having paper title to a tract of land is in actual possession of only a part, the law construes the possession to extend to the boundary of the tract, thus rendering actual possession of part necessary to constructive possession of balance. Under this principle the defendant showed a valid prescriptive title, and the verdict in his favor was correct.

Ejectment. Prescription. Possession. Before Judge MCCUTCHEM. Whitfield Superior Court. April Term, 1880.

Sufficiently reported in the opinion.

JOHNSON & MCCAMY, for plaintiff in error.

D. A. WALKER; SHUMATE & WILLIAMSON, for defendant.

HAWKINS, Justice.

This was an action of ejectment tried in Whitfield county for the recovery of lot No. 99 in the eleventh district. The lot was one of a body of land owned by defendant consisting of twelve lying in juxtaposition to each other. The plaintiff, on the trial, relied upon the grant from the state to one Stribbling, and from him to the plaintiff, Anderson. The defendant relied upon a prescriptive title, and supported by color, coupled with seven years' possession, and the question now here for adjudication is whether the defendant's prescriptive title is better than the one submitted by the plaintiff.

The decisions in the 28th and 30th *Ga.*, rested on the idea that a constructive possession was that which *title* draws to itself; that is to say, when A owned a tract of land entirely vacant, he was in the constructive possession

ereof. This, with other incidents to the writ of *forme*-  
 in remainder in use in Georgia prior to the Code,  
 ected the plaintiff's claim and title, and not the limita-  
 n provided in the law to protect prescription. But the  
 de abolished the statute of limitations in reference to  
 verse possession of lands, and provided in lieu thereof a  
 stem of prescription, which enacts that seven years'  
 ssession, with color of title and claim of right, etc., shall  
 nstitute a title to land in Georgia.

The Code declares constructive possession to be a pos-  
 sion of lands where a person having paper title to a  
 ct of land is in actual possession of only a *part thereof*.  
 such cases the law construes the possession to extend  
 the boundary of the tract; hence adjacent owners may  
 in constructive possession of the same land, being in-  
 ded in the boundaries of each. In such cases no pre-  
 scription can arise in favor of either. See Code, §2681.

The principle here, as to constructive possession, gives it  
 w characteristics not theretofore recognized by our  
 urts, and limited the same to an actual possession of  
 part with color of title to the rest of the tract.  
 erce it might well have been held that A, residing in  
 ll county, with a title to a lot of land in Lee, with no  
 ual possession of a part of that or adjoining lots in  
 e settlement, that he was in the constructive possession  
 the lot in Lee; so it was considered in 28 *Ga.*, and  
 ewise in the decision in 30 *Ga.* of *Wiley vs. War-*  
*ck*, but the Code in the section referred to requires  
 re to constitute constructive possession of land—that  
 e owner shall have actual possession of a part of the  
 ct or settlement with color and claim of right to the  
 ance.

The prescription of the Code also requires the possession  
 be *bona fide*, not originating in fraud, the possessor's  
 n right, not permissive, but exclusive, continuous,  
 aceable and uninterrupted, coupled with claim of right.  
 t us apply these elements of our law supporting pre-

scriptive titles to the case at bar. The defendant resided on, and is in actual possession of, twelve lots, adjacent to this lot, the one sued for. He obtained a deed to the whole including this lot; such deed was recorded more than seven years before the suit was instituted; the adjacent lands were in a state of cultivation, with buildings, enclosures, etc., with continuity of holding, marked the character of defendant's possession.

In the view we take of this point, it is unnecessary to decide as to whether the bond for title or the noncuius prodest will give color of title, for this point must control the case, whether there was any actual possession of the particular lot by the plaintiff or not.

It has been ruled twice in this court that such a possession of an entire body of land made up of several lots with a deed recorded to the whole plantation, would give a good prescriptive title to the whole.

The actual possession of the other lots, with color of title to the whole, would extend the possession to the entire boundaries. The court also said that before the color could avail to extend the actual possession of a part of the plantation by construction to the whole, including the lot in controversy, the deed, as color, must be recorded; not thereby to hold that the mere recording of the deed would be possession or an evidence thereof, but as an element in the *bona fides* of the claim; besides, its record would discover to the claimant the extent of the tract mentioned and claimed in the deed. For the Code requires not only all the other characteristics mentioned, but that the possession shall be in good faith and not fraudulent; and we think the latter cases go to law, and not in conflict with the reasons and decisions discussed in 28th and 30th *Ga.*

The evidence sustained this theory, and the jury found, the judge approved the result, and so do we.

Judgment affirmed.

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Thomas vs. Wilkinson *et al.*

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THOMAS vs. WILKINSON *et al.*

ere a wife sought to enjoin the sale of her husband's land on the grounds that she had an interest of \$965.00 principal in the *fi. fa.*, that the holder, who was a transferee, had knowledge of her interest, that she was unable to bid on the property and desired to have the sale restrained until she could contest her rights with the holder, there was no abuse of discretion in refusing to restrain the sale, but ordering a sufficient amount to secure her rights to be retained by the sheriff until further order.

injunction. Before Judge SPEER. Coweta County. Chambers. May 17th, 1880.

reported in the decision.

ROBERT S. BURCH, for plaintiff in error.

J. D. FREEMAN, for defendants.

WILKINSON, Chief Justice.

This bill was filed to enjoin the sale of certain lands as property of W. W. Thomas, under executions conveyed by U. B. Wilkinson. It was brought by the wife Thomas on the ground that she owned an interest in the oldest of the *fi. fas.* to the amount of \$965.00 and interest, put in it by her, and is brought against her husband and said Wilkinson. Wilkinson bought the *fi. fa.*, alleges, with knowledge of her interest; on the other hand, he denies all knowledge of any interest in her, but alleges that the sureties took up the *fi. fa.*, that he, Wilkinson, paid them at the request of Thomas, the husband, took control thereof against Thomas—that the *fi. fa.* contained certain credits on it as paid by Thomas, and among them one of \$965.00 which was paid to the sureties before he bought the *fi. fa.*—that he bought in good faith and to the credit of Thomas, and would not have bought if he had known that the wife had any interest in the *fi. fa.* His

answer is sustained by the deposition of one of the parties, and the complainant's case by the affidavit and answer of her husband. The complainant urged that the sale be restrained because she could not bid on account of her poverty, Wilkinson having control of the *fi. fa.* until she could contest her right as to an interest in the *fi. fa.* with Wilkinson.

The court granted the injunction so far as to order the money to the amount of her claim, with interest, to be held by the sheriff to answer her claim if found just, and directed the sale to proceed.

The court did not abuse its discretion in this order. Of course, if the sheriff is not a party, he should be made one, as the order is to him to sell and to hold the future disposition a part of the proceeds of the sale.

Judgment affirmed.

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ROBINSON *et al.* vs. ALEXANDER *et ux.*

1. Where a defendant files equitable pleas setting up facts upon which the jury are to pass, they may return a verdict covering the facts, which will be sufficient and legal, if it decides the issue of the trial so that a decree may be moulded thereon.
2. One party to an issue being dead, the other is an incompetent to testify as to what passed between them.
3. Nor can such a witness testify as to what was reported to him by other parties as coming from the deceased.
4. A party having an absolute deed as security for a debt, may recover in ejectment; nor can the maker of the deed defeat a recovery by merely setting up a partial payment of the debt. An equitable defence for that purpose should go further and tender the balance due, or allege some good reason why it would be inequitable for him to be ejected, with a proper prayer for relief.
5. As full and complete equity can be done by upholding the verdict (it being supported by the testimony), and giving directions for the guidance of the court below, it will be so ordered.

Equity. Verdict. Practice in the Superior Court. Witness. Evidence. Pleadings. Ejectment. Before Judge HOOD. Early Superior Court. April Term, 1879.

Reported in the decision.

E. C. BOWER, for plaintiffs in error.

R. H. POWELL, for defendants.

SAWFORD, Justice.

In April, 1873, J. W. Alexander gave Bird & Robinson a note for \$1,369.42, and a mortgage on certain lands to secure its payment. Failing to pay the money, the mortgage was foreclosed in October, 1874, the land levied upon and sold in March, 1875, bought by Bird & Robinson for \$500.00, and the sheriff made them a deed.

On the sixth day of April, 1875, the defendant in the mortgage, J. W. Alexander, and his wife, A. A. Alexander, conveyed by deed the same land—there being some irregularities in the foreclosure of the mortgage—together with some other lands, to Bird & Robinson, who gave a deed, conditioned to reconvey to A. A. Alexander upon the payment of the original note of J. W. Alexander.

In the year 1877 Bird & Robinson—Alexander's note being still unpaid—brought their action of ejectment to recover the land, relying both upon the deed from the sheriff under the mortgage sale, and the deed made by Alexander and wife.

The defendants pleaded: 1. The general issue. 2. That the sheriff's deed was void for want of legal service of the writ *et nisi*. 3. The sale was void because the land sold for only \$500.00, when it was worth one thousand. 4. That the last deed was but a mortgage without consideration, void because usurious, and that the signatures were procured by fraud. 5. Payment of \$1,000.00 by A. A. Alexander on a debt of J. W. Alexander. 6. That the deed was procured by duress.

Upon the trial the jury returned a verdict for the de-

fendants on the issues made as to the deeds, and that their possession under them was legal, and they further found the sum of \$1,240.00 to be due to Bird & Robinson on the note for the payment of which the mortgage was given, and upon the payment of which Bird & Robinson had obligated themselves by bond to reconvey the land.

A motion was made for a new trial on various grounds which was refused, and this court is called on to consider and adjudge the errors therein alleged, which are :

1. That the verdict is contrary to law in not specifying on which plea found. Upon this ground we hold that where the pleas filed by a defendant are such as are known in our practice as equitable, setting up facts upon which the jury, under the charge of the court, are to pass, they may return a verdict covering the facts, which will be sufficient and legal if the issues made in the trial are decided by such verdict, and capable of having a decree moulded thereon. The verdict in this case comes within the above rule.

2. That the court erred in allowing Alexander to testify to facts transpiring between Bird, one of the plaintiffs who was dead, and himself. To have allowed this testimony to be admitted was error under the evidence act of 1866, as well as under the rulings of this court.

3. That Mrs. Alexander was permitted to testify to facts as coming to her from Bird, and told her by Alexander and Powell.

Such testimony was clearly inadmissible to affect Bird or Robinson; first, because it was only hearsay, and second, because if it had been directly from Bird to her, she claimed to have had the facts testified about, her death and her being the other party to the suit and cause of action, were sufficient to have excluded them.

4. That the plea of payment of \$1,000.00 on the debt for which the deed was given, should have been stricken unless accompanied by a tender of the balance due on the note.

This court has ruled that a party having an absolute

as a security for a debt may recover in ejectment, though partial payments may have been made on the debt. Where a defendant sets up an equity in the way of a partial payment, the same falling short of his full liability, will not avail him by itself alone; he should go forward and relieve himself by a tender, or such other equitable reasons as would show that although in default, he wanted nothing inconsistent with his original contract. Such as that he is from his poverty unable to pay the balance due, and that the land is worth over and above that sum, or that he has by improvements put in the land so greatly increased its value, that to eject him without allowing him an opportunity for compensation would be inequitable, and concluding with a proper prayer for relief. For want of some other allegation, there-in connection with partial payment, the same was decried and should have been stricken.

There are other errors complained of as to the ruling of the court, and which might, in connection with the already considered, justify a reversal of the judgment in refusing a new trial. But after a thorough examination of the testimony, and due consideration of the findings by the jury, we think that their verdict should be upheld, especially so, as full and complete equity may be meted out to the parties and end the litigation. We therefore affirm the judgment of the court below in refusing a new trial, and under §§ 218 and 4284 of the Code, we order and direct that a final decree be entered up on the verdict rendered to the effect that the lands sued for be advertised and sold by the sheriff, as in cases of sales after execution, and after paying all costs, and the sum of \$1,240.00 with interest thereon from the date of the finding by the jury of said verdict, to the plaintiffs, that the balance be paid over to Amanda A. Alexander, defendant, she being the person to whom they bound themselves to reconvey the land upon the payment of the debt.

Judgment affirmed with directions.



## BAILEY vs. THE STATE OF GEORGIA.

1. An indictment for malicious mischief which charged the commission of the offense in a certain year without naming either a day or month was defective, and should be quashed on special demurrer before arraignment.
2. The mere shooting of a cow is not rendered criminal by the statute, but only the killing or maiming of cattle or the killing of a hog. In other cases the owner is remanded to his civil action.

Criminal Law. Indictment. Before Judge SIMMONS.  
Monroe Superior Court. February Term, 1880.

Reported in the decision.

W. D. STONE; CABANISS & TURNER; H. C. PEEPLES,  
for plaintiff in error.

F. D. DISMUKE, solicitor-general, by STEWART &  
HALL, for the state.

HAWKINS, Justice.

This was an indictment in Monroe superior court against the defendant, Bailey, for malicious mischief. The same was returned by the grand jury at the July term, 1879.

1. The charge was that the defendant did on the — day of —, 1879, shoot in the side a certain cow, thereby wounding and injuring her, and rendering her less useful to the owner. To this indictment the defendant, before arraignment, demurred upon the ground that the same did not allege a day, or that the crime was committed before the finding of the bill of indictment, which demurrer the court overruled, and defendant excepted. Code, §4628 provides "that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so

ly that the nature of the offense charged may be understood by the jury, also the form of every indictment or accusation shall be as follows: The grand jury shall charge the defendant of the county aforesaid with the offense of —, for that A.B. (here state the offense with sufficient time and place of committing the same, with sufficient certainty) contrary to the laws of said state," etc.

58 Ga. the court, in the case of *Harris vs. The State*, says: "In regard to this point that after arraignment and plea, the indictment alleging an impossible day, if after the indictment was found, would be held good, even where it was excepted to in time, on special demurrer in writing, 25 Ga., 516; 55 Ga., 304 and 625. These are all cases where the defendant had gone to trial and the time for special demurrer had passed, had sought no advantage. But the defendant is entitled, if he demurred in time, to have a perfect indictment in form containing the essential elements of the time and place, and if he demurred specially before arraignment, he ought to have the time stated with reasonable certainty at least. 58 Ga., 332, *Harris vs. The State*. We think the foregoing decision is in accord with the requirements of the Code, that some day ought to be alleged in the indictment within the statutory period and before the finding of the bill, and that such allegation ought to be clearly and distinctly stated, therefore the court erred in overruling the demurrer to the indictment.

As to the second ground, it appears that the defendant was charged with shooting the cow of the prosecutor in the side, and the question arises, was that a crime according to the law of the state?

It will be remembered that at the common law it was a crime to kill, maim, wound or hurt a horse, cow or other animal, but the injured party was put to his civil remedy to recover his damages.

Our legislature in 1755 and 1801 adopted the common law and provided that in case any person or persons

shall kill, maim, hurt, destroy any cattle, horses, sheep, goats or game, trespassing or shooting into any garden, etc., shall answer and make good to the owner thereof the damages and injury sustained, the same to be recovered before two justices of the peace for the district, to be levied by distress and sale of the offender's goods. 5 Prince's Digest, page 180, edition 1821.

Subsequently by act of the general assembly, it was made criminal to kill or maim a horse, cow and the like, and also to kill a hog. See Penal Code of 1817, page 369. See Code, section 4612.

So it seems that the legislature did not intend to make it a criminal offense to wound, hurt or injure a cow, horse or the like, but only criminal when the act was to kill or maim in the case of cattle, and kill in case of swine, and in the law the words "kill, maim," were intended to be understood in their technical signification. We are therefore of opinion the court erred in not so holding.

Let the judgment be reversed.

### TANT *et al.* vs. WIGFALL.

Courts of ordinary have general jurisdiction of the granting or revocation of letters of administration. Therefore the judgment granting letters as to a particular estate cannot be impeached collaterally on the ground that the decedent resided in a different county. Such a judgment must be attacked in the court where it was rendered. Especially so when the judgment itself recites the fact that the deceased was late of that county.

Jurisdiction. Ordinaries. Administrators and executors. Before FRANK H. MILLER, Esq., Judge *pro hoc vice*. Richmond Superior Court. October Term, 187

Reported in the decision.

S. WARREN MAYS, for plaintiffs in error.

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*Tant et al. vs. Wigfall.*

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CLAY FOSTER, for defendant.

SON, Chief Justice.

This case was a suit for land in Richmond superior court. Plaintiffs claim title as the immediate heirs of I. S. Tant, deceased, who, it is admitted, owned the land. Defendant claims the land by a succession of deeds run-back to deeds from Hills, who sold said land as administrator of I. S. Tant, deceased, under an order of the court of ordinary of Floyd county, under which jurisdiction said letters of administration were granted to said administrator.

Plaintiffs claim that said deceased resided in Richmond county at the time of his death, and that before said letters of administration, and all subsequent proceedings and sales under them, are void for want of jurisdiction in the court which granted them. It appears from the record that Hills, administrator of I. S. Tant, deceased, had regular letters of administration granted to him by the court of ordinary of Floyd county, upon those letters and on the face of the proceedings before that court, it was recited that he was late of said county of Floyd, deceased; that as such administrator he administered the estate of deceased, and sold the land regularly under legal orders of that court, and after due advertisement thereof; and that the defendant purchased at said sale. So that the question is, can the plaintiffs, who are the heirs-at-law of the deceased, recover the land, both parties claiming under the intestate, the plaintiffs as heirs-at-law, and the defendant by virtue of the deed of the administrator, executed under and pursuant to said sale.

The legal question therefore is, did the title pass out of the estate of the intestate by virtue of that sale, and it turns on the question, did the administrator, Hills, have the power to sell? The sale was regular, and the point made is, that the court of ordinary which

clothed the administrator with the letters, had no objection to do so, because Tant resided in Richmond county, not in Floyd county, when he died. On that point the superior court, Frank H. Miller, Esq., presiding *pro vice*, ruled that the recitals on the face of the proceedings in the court of ordinary of Floyd county, that the deceased was of said county at his death, could not be attacked collaterally in another court, and until the matter of administration was set aside in the court which issued the letters, the plaintiffs, heirs-at-law of the intestate, concluded thereby.

To this ruling the plaintiffs excepted, and this is the issue of law before us.

Courts of ordinary in Georgia have general and exclusive jurisdiction of "the granting of letters testamentary of administration and the repeal or revocation of the same." Code, §331. The court of ordinary of Floyd county, therefore, had jurisdiction of the general subject-matter of granting letters of administration on the estate of deceased persons; and as it has that general jurisdiction, even if the fact did not appear on the face of the letters and proceedings, that the intestate died a resident of Floyd county, and that this fact was made known to the court of ordinary and judicially determined by that court, the presumption would be that such had been done. But when it is recited in all the proceedings before the court, and in the letters themselves, that the deceased was of that county at the time of his death, it is patent that the court passed upon that question and adjudicated it. If so, the heirs-at-law, adult or minors, are concluded by that judgment, just as much as they would have been if a plea to the jurisdiction been filed, and witnesses examined thereon *pro.* and *con.*, and the plea overruled. At least they would be concluded in all courts except the one which rendered the judgment, where only it could be attacked and set aside, or revoked, or in a court of chancery on a proper case made. Such seems to be the great

rent of authorities cited by the defendant in error, and such is unquestionably the law of this state as adjudicated by this court in 7 Ga., 362. There it is directly ruled that such recitals in the letters and proceedings of the court of ordinary import verity and cannot be collaterally attacked; and though in some cases cited by the plaintiffs in error, principles may be announced in opinions of judges of our own courts seemingly variant therefrom, we are not aware of a single case in our books where the facts made are the same as in that case and in this, any contrary decision or even *obiter dictum* is to be found. And the opinion of a judge must always be read in connection with the facts of the particular case in which it is delivered, and its meaning ascertained by reference to those facts, for his mind is upon those facts and the application of the legal principles announced thereto.

The case in the 7th differs from this only in the fact that at the time the opinion there reported was delivered, courts of ordinary were courts of limited jurisdiction, whereas now their jurisdiction is not only original and exclusive, but general, under the Code of Georgia adopted subsequently thereto. If within courts of limited jurisdiction, the recitals which gave the particular county jurisdiction were conclusive and could only be attacked in the court which granted the letters, *a fortiori* must such recitals conclude those assailing the jurisdiction, when those courts are made courts of general jurisdiction, until the letters are revoked by the court which granted them. If it be true that the residence of the intestate was in Richmond and not in Floyd county, when the court of ordinary of the latter county granted them, let the application to annul them be made in the court of ordinary of Floyd county which issued them.

Any other rule would have administration good and valid for certain purposes and in particular counties, and bad and invalid elsewhere and for other purposes. In this case, under these letters, years ago, the year's

support was set apart for the family of the intestate and the estate generally appears to have been fully administered. Shall it be a valid administration everywhere except in the county of Richmond, where this ejectment cause is pending and in that particular cause alone, or shall it be a valid administration all over the state, or void in every county thereof? To rule the former doctrine would be to breed inextricable confusion; to hold the latter, is to produce harmony and uniformity everywhere. The first would unsettle titles until the expiration of seven years after the youngest child of a decedent had attained his majority; the last would confirm and establish them until the very court which granted the letters should set them aside, which would never be done except in a strong case and upon the most satisfactory proof. It seems to us, therefore, that even if the current of the authorities everywhere did not run with overwhelming force to sweep away the doctrine that letters of administration could be attacked collaterally in any court where they stood as a breakwater in the way of any party litigant, and if the counter-currents were as strong, principle, reason and public policy would demand the adjudication that recitals of the fact on the face of the record that the court had jurisdiction of the particular species of the general *genus*, over which its jurisdiction is undoubted, should be held conclusive everywhere until assailed and overthrown in the court which established that fact. In other words, that as courts of ordinary have jurisdiction of the subject-matter generally of estates of decedents and the grant of administration thereon, so when the court of a particular county asserted its jurisdiction thereof by recitals of the residence of the decedent therein, such record proof of its adjudication of the question of jurisdiction could only be assailed in the court which thus gave record proof of that adjudication. But be this reasoning sound or fallacious, the question was answered and adjudicated in 7 *Ga.*, 362, on facts all fours with this

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*Allen et al. vs. Sharp, guardian.*

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...e, and the point is hereby re-affirmed and settled. See Howard, 319; 31 Ind., 456; 16 Ohio, 455; 65 Mo., 250; Leigh, 119; 62 Ga., 627. Judgment affirmed.

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ALLEN *et al.* vs. SHARP, guardian.

Where suit was brought on a note given by S. as trustee for his wife, "for purchase money of house and lot in the town of Forsyth," and judgment was rendered thereon, to be made out of the house and lot named in the note, in a contest between the execution issued thereunder and a younger *fi. fa.* founded on a judgment against the specific property from the sale of which the fund in the sheriff's hands arose, it was competent to show that the consideration of the note was the purchase money of this particular property; and if shown, the older *fi. fa.* would be equitably entitled to the fund.

In a contest over a fund in the hands of the sheriff arising from the sale of trust property, if the equitable claims of the *fi. fas.* are equal, that founded on the oldest *fi. fa.* will take the fund.

Where a vendor who had given a bond for title subsequently recovered judgment for the balance of purchase money due, filed a deed to the vendee, and had the property levied on, in a contest over the fund arising from the sale of the property, the lien of his *fi. fa.* would be superior to that of a younger *fi. fa.* founded on a debt for money borrowed to pay part of the purchase money.

Executions. Judgment. Lien. Trust. Before Judge  
 REER. Monroe Superior Court. February Term, 1880.

To the report contained in the decision, it is only necessary to add the following:

Sharp, guardian, claimed the fund in the sheriff's hands under a *fi. fa.* issued on a judgment on a note signed by one, as trustee for his wife, and which stated that it was for the "purchase money of house and lot in the town of Forsyth." The judgment provided that it was



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*Allen et al. vs. Sharp, guardian.*

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to be made out of the house and lot named in the note; and the *fi. fa.*, that it should be levied on the house and lot mentioned in the judgment. The testimony in his favor was in substance, as follows: Sharp was guardian of Dillard; he succeeded one Sterne in that capacity. Sterne sole the lot, the proceeds of which are now in controversy, to Stone, trustee, receiving a part of the purchase money, and giving bond for title. Sterne owes Sharp as guardian, and by agreement between the parties he transferred the debt of Stone, trustee, to him. Sharp then took the note sued on, Sterne made him a deed, and he gave a bond for title to Stone, trustee. He stated in his testimony that the way he knew the debt was for purchase money, was from the statements of Stone and Sterne. (The note sued on bears date February 3d, 1874, while the deed from Sterne to Sharp, guardian, is dated April 15th). Before the levy was made, Sharp, guardian, made and filed a deed to Stone, trustee.

Allen *et al.* claimed under an award of arbitrators, subsequently made the judgment of the court against this property. The testimony in their favor was to the effect that Stone, trustee, borrowed money from one Walker, as he stated, to make the first payment to Sterne, on the purchase price of the lot. On this Walker debt Allen and others were securities, and he made them a deed to secure them, of older date than the deed from Sterne to Sharp, guardian. They were compelled to pay the debt, and are now seeking to reimburse themselves.

Willingham & Dunn claimed under a *fi. fa.* founded on a debt for building materials used on the trust estate.

Of the three judgments, Sharp, guardian, was the oldest, Willingham & Dunn, the next, and Allen *et al.* the youngest.

The jury found for Sharp, guardian. The other claimants moved for a new trial, which was refused, and they excepted.

BERNER & TURNER, by H. C. PEEPLES, for plaintiffs  
in error.

R. P. TRIPPE, for defendant.

CRAWFORD, Justice.

This contest arises upon a rule to distribute the money raised from the sale of a house and lot, sold as the property of S. H. Stone, trustee of his wife, Julia A. Stone. There are three contestants with three *fi. fas.*, and each one claims to have the highest equitable right to the fund.

The first is Sharp, guardian of Dillard, who alleges that the consideration of his debt was the purchase money due upon the house and lot sold.

The second is Allen *et al.*, his co-plaintiffs, who also allege that their *fi. fa.* was for the purchase money paid upon the house and lot;

The third is Willingham & Dunn, who allege that their *fi. fa.* was for building material used in the improvement of the said house and lot.

The Sharp judgment is dated August 26th, 1875, is rendered against Stone, trustee, and to be out of the house and lot named in the note, which note recites, as consideration, five hundred dollars for purchase money of house and lot in the town of Forsyth.

The Allen judgment bears date August, 1877, was rendered upon an award of arbitrators, the submission bearing date September 1st, 1876; the award, November 3d, 1876, and which provided that if the parties failed to perform the judgment of the arbitrators, an order might be obtained from the judge of the superior court in term or vacation to compel the enforcement of the same against this house and lot.

The Willingham & Dunn *fi. fa.* was rendered April 22d, 1876, and against the house and lot of Stone, trustee, for

building material used for the improvement of the same.

Thus stood the parties before the court below upon the new trial which was granted by this court at its February term, 1879.

Upon the first trial the money now contended for was ordered paid over to the Sharp *fi. fa.*, which was excepted to, because the contestants insisted, that although it was of older date, yet theirs were issued on judgments rendered against the trust property and sold according to §§3377, 3382 of the Code, whilst the Sharp judgment was not so issued, and was, therefore, void.

In reply, Sharp claimed the money upon the ground that his *fi. fa.* was founded on a lien against the property sold, for the purchase money due thereon, as provided by §3654 of the Code. This court held that there was nothing in his—Sharp's pleadings or judgment, which sufficiently identified the property to justify his claim to the money. It was further held, that his judgment was a valid one, and if the facts were that the money was raised from the house and lot on which the purchase money was due, and for which the judgment was rendered, then it was equitably entitled to the money, notwithstanding that specific house and lot was not described and set forth in the judgment. Upon the new trial, the jury again found in favor of the Sharp *fi. fa.*, he having amended his pleadings so as to conform to the ruling of this court when the case was here before, and again the contestants except.

The case as now presented by the record shows a fund in the hands of the sheriff of some \$500.00, raised from the sale of a house and lot as the property of S. H. Stone, trustee, under *fi. fas.* in favor of Sharp and Willingham & Dunn, the latter of which is against the specific property sold, the former against the defendant, and claimed to be against the specific property for purchase money. The right of Willingham & Dunn, therefore, to the payment of their execution is secondary to that of Sharp, if his debt be either for the purchase money, or his judg-

ment prior in point of time and against the property sold. Touching the *fi. fa.* of Sharp, it is by no means clear to us that the debt due by Stone to Sterne was a *bona fide* debt for the purchase money of this house and lot, and it is less so, that the debt from Stone to Sharp was, when viewed in the light of the whole proof, though we do not decide the legal effect of the new contract between Sharp and Stone in their relations of vendor and vendee.

As to the *fi. fa.* of Allen *et al.*, it appears to us that it is immaterial whether that is regular or even illegal, so long as it is admitted by counsel for Sharp, that it arose upon a debt for borrowed money with which to make the first payment for the house and lot, and that a deed to the same of older date than the one from Sterne to Sharp had been executed by Stone to Allen *et al.*, to indemnify them against loss.

If, therefore, all the testimony be accepted as true, both these last *fi. fas.* were founded on the consideration of purchase money, and were their status in other respects the same, then their equities to the fund would be equal. But it will be seen that Sharp reduced his debt to judgment in August, 1875, and conceding that Allen's was all legal and right, it is two years the junior of the other, and must in a contest over money raised by the sale of *defendant's property* yield to its senior adversary. This is not only the rule in cases of strict law, but in equitable proceedings as well, because equity is ancillary, not antagonistic to law.

Where equities are equal, the law will prevail; if they are unequal the superior must prevail, and superior diligence as to time will create such inequality. Code, §§3083, 3087; 3 Kelly, 460.

Thus with the testimony identifying this house and lot as the one against which the Sharp judgment was rendered, and which did not appear in the former adjudication of this case by this court, it would be entitled to the money raised from the sale. If the testimony be in-

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Stodghill vs. The State.

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sufficient to identify it, then the money having been raised by a sale of the property under the specific judgment of Willingham & Dunn, and the judgment of Sharp against the defendant, when brought into court, unless the specific judgment had a higher lien, which does not appear, then the oldest judgment attached to the fund and was entitled thereto.

Or if it be true that the money borrowed from Walker was used to make the first payment, as insisted by Allen *et al.*, and Stone only had Sharp's bond for titles, and their relations were those of vendor and vendee, a partial payment of the purchase money thus having been paid, brought the Sharp *fi. fa* within §3586 of the Code, and entitled it to the money.

We think, therefore, that the court committed no error in refusing a new trial.

Judgment affirmed.

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STODGHILL vs. THE STATE OF GEORGIA.

The verdict was not contrary to law or the evidence, and a new trial is refused, even though the solicitor general stated that he thought the ends of justice might be better accomplished by the grant of a new trial.

Criminal law. New trial. Before Judge SPEER. Butts Superior Court. March Term, 1880.

Reported in the decision.

T. W. THURMOND; BECK & BEEKS; M. O. MCKIBBEN; H. C. PEEPLES, for plaintiff in error.

F. D. DISMUKE, solicitor-general, for the state.

HAWKINS, Justice.

The defendant, Felix Stodghill, was tried and convicted of murder in killing one Theophilus Jones, with recom-

endation to mercy. - He made a motion for a new trial in the court below, which was overruled, and he excepted. The grounds were that the evidence did not show that a homicide had been committed, or that defendant used a weapon likely to produce death, or that Jones was dead; that no malice was shown, and that the verdict was contrary to evidence, without evidence, and contrary to law. When the case was called in this court for argument, the solicitor-general of the circuit announced to the court that, from the circumstances of the case on the trial of the defendant in the court below, as well as the apparent mental condition of the defendant, the ends of justice could be subserved by granting him a new trial by this court. He did not appear before the judge on the motion for new trial, as he thought the judge would grant the same.

We have given the case a careful examination, with the desire to grant a new trial, on account of the high regard we have for the opinion of the state's officer, and his statement made in open court, and it is painful for us to make the decision refusing a new trial, but a sense of imperative duty compels us, in the administration of criminal justice, to decide in accordance with established principles in this as in all other cases.

The evidence shows that defendant and deceased were both colored men; were together, with two other men, pulling fodder in a field, when defendant used vulgar and obscene language to the deceased, who remarked that if you repeat that I will hit you with a rock. Defendant repeated the words and deceased stooped down as if to get a rock, when defendant struck him on the temple with a rock weighing one and three-fourths of a pound, from which Jones died in six or eight minutes. There were no rocks in that part of the field, and the rock used was what the witness called an iron rock, not known on the land where the homicide occurred. Defendant and deceased had been quarreling during the week before the killing.

Two witnesses gave evidence and both were present or close by "at the killing."

One of them said: "They, deceased and defendant, had been quarreling nearly all the time from Monday until Thursday, when defendant struck deceased with the rock. Before difficulty, defendant did not pick up the rock; at the time defendant did not stoop down to pick up rock. Deceased did not make any effort to hit defendant. Surface of the ground sandy, and no rocks on the ground where the homicide took place. The rock was what I call an iron rock, flat, and weighed one and three-fourth pounds. Hit deceased on left temple, and deceased lived six, eight or ten minutes. The sizes of the two men were about the same. Jones was a little the stoutest. Don't think there was any rock like the one defendant hit deceased with on the plantation. Defendant used slighting expressions of and to deceased."

The other witness corroborated the evidence, and testified that when defendant had struck deceased he said that Jones had got him into trouble.

We see nothing in this case to reduce the killing from murder to manslaughter. It wants all the essential elements of manslaughter under our law.

The deceased at the time of the killing was not manifestly intending and endeavoring by violence or surprise to commit a serious personal injury upon defendant—in fact, was not assaulting defendant at all. Defendant began the abusive utterances, was prepared with the rock—not having stooped to get it, and there being no such rock on the plantation, and no rocks of any kind where the killing took place—and saying that deceased had gotten him in trouble. Whether these facts showed express malice is immaterial; the law implies malice in every killing where there is no considerable provocation, and where all the circumstances show an abandoned and malignant heart. Whether the rock was a weapon likely to produce death was demonstrated by the fatal result,

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Houser *vs.* Scott.

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and, besides, every person is presumed to intend the legitimate consequences of his act.

As it appears to us the court committed no legal error in refusing the new trial.

If, however, it shall hereafter appear that either on account of the mental condition of the defendant, or the circumstances connected with his trial, that this conviction ought not to remain, which this record fails to show, then there is another department of the government clothed with ample power to award him complete justice, in the exercise of executive clemency, and thither he must resort.

Let the judgment be affirmed.

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HOUSER *vs.* SCOTT.

Where one, in good faith and under advice from the ordinary, took up an estray, and had it appraised and returned in compliance with the requirements of the Code, and it was held in readiness to meet the demand of the owner, he was not liable for quintuple damages. Subsequent irregularities on the part of the officers would not affect him.

- (a) Where the whole conduct of the taker up of an estray was in perfect good faith, that the return was made on the sixth day after the appraisement will not render him liable.
- (b) Nor will he be liable because one of the appraisers was only a freeholder to the extent of being interested in a homestead estate.

Estrays. Damages. Freeholders. Before Judge SIMMONS. Houston Superior Court. April Term, 1880.

Reported in the decision.

W. C. WINSLOW; J. H. BRANHAM, for plaintiff in error.

DUNCAN & MILLER, for defendant.



JACKSON, Chief Justice.

B. W. Scott took up and had appraised and returned to the ordinary a sow, which had belonged to D. H. Houser. Houser sued Scott for not complying with the law, alleging damages at five times the value of the sow. The county court gave damages to the amount of \$32.50, whereupon the defendant sued out the writ of *certiorari* to the superior court, which reversed the judgment of the county court and gave judgment for defendant for costs, and this judgment is assigned as error here.

The facts as made out by defendant are that the hog had been in Scott's field some months, that he inquired among all the neighbors whose property the sow was, that he was informed she belonged to a person who had gone away, that finally he went to the ordinary and, under his instructions, had her appraised and returned to the ordinary, who thereupon caused her to be sold.

It is for failing after taking the estray up to have it appraised and returned, or forthcoming according to law, that section 1436 of the Code makes the taker up liable to the owner for five times the value of the estray. After the taker up had done this, then the ordinary's duties begin. Code, §§1429, 1430, 1431; and if the ordinary fail in his duties, the law does not mulct the taker up in these heavy damages. His obligation is imposed by §1428 of the Code, which enacts that within five days after he takes up the estray, he shall exhibit it to two free-holders of the district, who are to note the marks, etc. etc. and appraise it, which he is to return to the ordinary within five days, and make affidavit that the marks are correct and have not been altered, and the damages are imposed for his failure in this, and this only, unless he has wilfully abused or neglected the animal. Code, §1436.

The record shows that Scott concealed nothing, but got his instructions from the ordinary, and did what the law

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*Phillips vs. Bass et al.*

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quired him to do. It seems only doubtful that one of the two appraisers was a free-holder, and that the appraisal was returned in time.

The proof is that the defendant relied upon the other to get another, naming two other free-holders; but that the free-holder relied upon got a young man to act who was a freeholder only to the extent that he was interested in a homestead estate. He was a neighbor, living in the district, twenty-one years old, and interested in a freehold estate sufficiently, we think, to save the defendant from these damages under even a strict construction of this stray law, so far as it imposes this duty upon the taker up of the estray. The sow, and pigs too, are forthcoming, ready to respond to the owner's claim when made. This case is not one which demands these punitive damages. The case of *Walker vs. Collier*, in 61 *Ga.*, 341, is wholly unlike this. The facts there made the transaction a great wrong. Collier, and the appraisal was made by no free-holders, but persons who had no interest in the district or county, but were tramps, as Judge WARNER denominates them in delivering the opinion in that case.

This defendant did his best to do his duty, and seems to have succeeded substantially in appraising and returning the animal to the ordinary, and now has it ready to answer plaintiff's demand, and thus it is forthcoming according to law.

Judgment affirmed.

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PHILLIPS vs. BASS et al.

After a homestead has been set apart to a bankrupt without objection, and approved, it passes out of the jurisdiction of the bankrupt court, and if there are claims against it superior to the exemption, they must be enforced against the bankrupt in a court of competent jurisdiction, and not against the assignee by petition to the bankrupt court.

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Phillips vs. Bass et al.

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Bankrupt. Homestead. Jurisdiction. Before Judge CRISP. Sumter Superior Court. April Term, 1879.

Reported in the decision.

HAWKINS & HAWKINS, for plaintiff in error.

ALLEN FORT; GUERRY & SON; E. G. SIMMONS, for defendants.

CRAWFORD, Justice.

The defendant in error, Bass, was adjudicated a bankrupt, December 6th, 1873. Calloway, his assignee, set apart to him a homestead, which includes the land in controversy, September 11th, 1874.

Bass—his wife joining in the deed—sold this *now* disputed land to Phillips, January 8th, 1875, and took his notes, with mortgage on the land, to secure the payment. This suit is to foreclose the mortgage, and to get a judgment on the notes. Phillips sets up, by way of defense, the sale of the land under an order and decree of the district court of January 15th, 1877, to pay off a lien creditor for material furnished and used on the land. Bass replies that the court had no jurisdiction of the subject matter, the same being his homestead, nor of the person of the bankrupt, he never having been notified of the petition to sell, and therefore the said order was void.

Upon this state of facts, and about which the parties agreed, the court below held that the district court had no jurisdiction to pass the order for the sale of any part of the homestead land, and that the said sale was void, and gave judgment on the notes sued, and granted a rule absolute foreclosing the mortgage.

The question, therefore, presented here is, whether that judgment was right.

This land being a portion of the homestead exemption set apart to Bass, the bankrupt, in September, 1874, by

the assignee, and no exceptions filed thereto, the assignee thereafter in no sense represented the same, nor was in anywise concerned therewith. Bump on Bank., 161.

Had exceptions been filed as the law provides, or a petition by a lien creditor to subject it to the payment of debt from which it was not exempt before it was finally set apart, we have no question but that the exemption could have been granted subject thereto, and the same might have been enforced, though the adjudications as to this latter proposition are by no means uniform.

In this case neither was done—the property was without objection from any quarter set apart to the bankrupt; two years thereafter an order was taken, reciting that a sale *nisi* having been served on *the assignee* to show cause why “part of the property set apart to bankrupt for homestead exemption” should not be sold, and he having shown no cause, the same was ordered to be sold.

In the case of *in re Miles Bass*, bankrupt, Vol. 15, 453, Bank. Reg., Justice Bradley says:

“The assignee applied for an order to sell the property in question, notwithstanding the homestead right; the district judge refused so to order upon the ground taken by the district court of this and other districts, that the same is excepted by the 14th section of the bankrupt act, and is not subject to the jurisdiction of the bankrupt court, but must be pursued by those who have claims against it in the proper state tribunals. I think the position taken by the district judge is correct. . . . If the creditor has a claim against it he must prosecute that claim in a court which has jurisdiction over the property which the bankrupt court has not.” After referring to that equities might arise between creditors, some of whom might have a lien on the homestead, and others not, he concludes by saying: “But even where the right to marshaling existed, the bankrupt court could not assume jurisdiction of the exempted property and order it sold, but would require the favored creditor to pursue his

remedy against such property in a forum that could fully reach it."

A labored and careful research into all the adjudicated cases, as well as a due consideration of the act itself, brought us to the conclusion that, *after the exemption to the bankrupt has been made and approved*, that the property in contemplation of law, and by the provisions of the bankrupt act, remains with the bankrupt. Whatsoever of incumbrances may attach to it are not removed from it; they override the exemption. But such cannot be enforced in the bankrupt court, because that court, having it in possession or under its control, would have to set aside the action of the assignee and bring the property within its jurisdiction before it could enforce the incumbrance. Liens upon the homestead exemption which are superior thereto, and which are so declared, leave the exemption remains therein after they are discharged to the bankrupt; but these liens, after the exemption has been made, cannot be enforced in the courts having jurisdiction of the subject-matter.

The judgment, therefore, of the court below, in so far as the same went, *between the parties before him*, was correct and is hereby affirmed.

Judgment affirmed.

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#### ROBERTS vs. THE STATE OF GEORGIA.

1. There was no error in administering the oath to twelve jurors at once, preliminary to their examination on their *voir dire* as to their competency. The practice rather commends itself to the court.
2. There was no error in postponing swearing the jurors in chief until a full panel of twelve was obtained.
3. An exception to the whole charge will not be sustained unless it is erroneous in its entirety. It was not error in the court to refuse the jury of the importance of their duty both to society and to the prisoner, for society has a deep interest in vindicating crime.

justice, and the life and liberty of the prisoner demand the gravest consideration.

If the interview which resulted in the homicide was sought by the defendant for the purpose of effecting a reconciliation with the deceased, and he was driven to the necessity of killing him to save his own life, and he had not brought the necessity upon himself, he would be entitled to an acquittal. But if the object of the interview was to kill, or for mutual combat with deadly weapons, then his offense would be murder or voluntary manslaughter according as his conduct was marked by deliberation or excitement.

No menace, threat, contemptuous gesture or presentation of weapons, without a manifest intention to use them presently, will justify the killing.

Before the slayer can be justified, it must appear that he acted without malice, not in a spirit of revenge—that the deceased was the assailant—that in order to save his own life it was necessary to kill his adversary, or that he was under the pressure of other equivalent circumstances. He cannot avoid the fearful responsibility of guilt by the bare fear or apprehension of danger; the danger must be urgent and pressing at the time. He must decide the momentous question with reference to his accountability to the law, at the time, and by the exercise of the same mental and moral faculties which he employed to shoot.

Criminal law. Murder. Jury. Charge of Court. Practice in the Supreme Court. Before Judge SIMMONS. Bibb Superior Court. April Term, 1880.

This case is sufficiently reported in the opinion. The defendant was James Roberts, and the deceased, his cousin, Solomon Roberts.

HILL & HARRIS; BACON & RUTHERFORD; C. J. HARRIS; JNO. L. HARDEMAN, for plaintiff in error.

R. N. ELY, attorney-general; C. L. BARTLETT, solicitor-general; W. DESSAU; G. T. BARTLETT, for the state.

AWKINS, Justice.

The defendant was placed upon trial for the crime of murder, in Bibb superior court, and convicted of volun-

tary manslaughter. After verdict of guilty of voluntary manslaughter, the defendant made a motion for a new trial, upon numerous grounds, amounting to twenty-seven in number, and we will proceed to consider the errors complained of in three respects: 1st, as to the formation of the jury: 2d, the charge of the court; and 3d, the finding of the jury.

1. It is insisted here that the court erred in having twelve jurors sworn at one time, well and truly to answer the questions touching their competency, and that the court in 60 *Ga., Williams vs. The State*, page 371, was illustrative of the point.

In that case the jurors were not put upon the prisoner singly, but by six at a time, after their competency was ascertained; but here the court, to save time, qualified twelve jurors at once; before the questions on the *voir dire* were asked, the simple oath that they would true answers make to such questions as would be put by the court or its authority, touching their competency, was taken, and when they were so sworn, then the court put each juror upon the prisoner separately, as was ruled proper in 60 *Ga.*, p. 371. We see no error on this point, but rather commend the practice. The prisoner can certainly suffer no harm in the administration of this preliminary oath.

2. So we can see no legal error in postponing until the twelve are obtained, swearing them in chief, preparatory to submitting to them, as an organized jury, the testimony of the prisoner. Under the old law, where the first twelve jurors constituted triors, there might have been a propriety in swearing those as they were accepted by the defendant; but now that the court is the trior, we do not see why it is not as legal to swear the whole jury after their selection by both parties and all together; but still we think the old practice is better.

3. But the main question, and the one argued here with marked ability, concerns the charge of the court, and the claim that the whole charge was erroneous, and altogether obnoxious to law, and many of its parts.

An exception to the whole charge will not be considered by this court, unless it be erroneous in its entirety—and that disposes of that exception, except to say that we see no error on the part of the judge, or the presiding officer in the administration of criminal justice, to remind the jury of the importance of their duty, both to society and the prisoner; for society has a deep interest in vindicating criminal justice, and the life and liberty of the prisoner demand the gravest consideration.

4. The parts of the charges complained of and the refusals to charge may all be viewed and considered as affecting the law of self-defense, voluntary manslaughter and murder.

The defendant was convicted of voluntary manslaughter, and the great question is, did the court submit the law controlling the issues fully to the jury so that they could say whether he was guilty of murder, either grade manslaughter, or justified in the killing? It appears from the evidence that the prisoner and deceased were business men, and on the day of the killing the deceased, his brother, and some others were standing on the side-walk Third street, in front of or near Conner's store and near the alley wherein he was killed. When prisoner and his brother came up prisoner had his hands in his pantaloons' pockets, and remarked to deceased, "Sol., I want to see you a minute." Deceased said "all right" and turned around and said to Jack, his brother, "hold my umbrella." The two walked off on the side-walk and crossing the alley, when about half-way, prisoner in front, some words were had, not precisely heard or understood by the witnesses, when defendant drew from the hip-pocket a self-loading pistol, shooting the deceased in the head, killing him almost instantly. Many witnesses give evidence that the deceased had a pistol in his right hand when he was shot, by his side, and his left hand lifted either to grasp defendant or to prevent being shot. Two of the witnesses testify that deceased at the time of the shooting said,



"don't, don't." One witness, the brother of defendant said that deceased drew his pistol as soon as he started to walk off with defendant at his invitation; also, that when defendant fired the fatal shot he stepped back several steps, drew and fired as quick as possible, quick as a flash of lightning.

The brother of defendant said, at the time of the shooting and just before, deceased drew his pistol, presented it, when defendant drew, fired and killed deceased. Evidence was also given by the brother of defendant that when the two got near the center of the alley defendant said, "So I want to make friends with you if you did run me out of town," when deceased said, "G—d d—n you I will kill it again," drawing his pistol, presenting it, reaching with his left hand to and at prisoner, when prisoner shot to save his life.

Much evidence and many witnesses gave evidence concerning the transaction, and the defendant's statement claimed that his object in seeking the interview was to effect a reconciliation with deceased, whereas the state claimed that his intent was to take the life of deceased, as manifested by all the circumstances surrounding the homicide, and the matter here of serious inquiry is, did the court submit the issues of law fully to the jury upon the questions?

If it be true that the purpose of defendant was peace and reconciliation—and he was driven to the necessity of killing the deceased to save his own life, and by his conduct had not caused the necessity, then he would be entitled to be acquitted.

On the other hand, if he sought the interview either to kill or for mutual combat, with deadly weapons, then the crime would be murder, or voluntary manslaughter, according as his conduct was marked by deliberation, or excitement; but if the purpose of the defendant was to offer peace and the deceased rejected the overture, drew his pistol, presented it, and was killed by the p

prisoner to save his own life, not with malice or for revenge, and if the killing was absolutely necessary to save his own life, then, and then only, would he be entitled to a verdict of not guilty. No menace, threat, contemptuous gesture, or presentation of weapons without a manifest intent to use them presently, will justify the killing; the law is tender of human life, and shields it with all the safeguards mentioned in the Penal Code, and before the slayer can be justified, it must appear that he acted without malice—not in a spirit of revenge—that the deceased was the assailant—that in order to save his own life it was absolutely necessary to kill his adversary, or other equivalent circumstances, etc. He cannot avoid the fearful responsibility of guilt by bare fear or apprehension of danger; the danger must be urgent and pressing at the time.

He must decide the momentous question with reference to his accountability to the law at the time, and by the exercise of the same mental and moral faculties he employs to shoot, to strike or to kill.

According to one view of the testimony in this case, that deceased had drawn his pistol when he started to walk to the alley with defendant—that defendant saw the weapon, and that it remained in that position during the scuffle and homicide, never raised or presented, and no effort to use it) prisoner was in as much danger at the first as he was at the last moment of the difficulty.

The mere show of a deadly weapon, without more, would not produce an exigency to justify homicide.

If he sought the interview with the deceased not to reconcile but to slay him, then his crime is murder; or if he sought it for a difficulty, or mutual combat, and with a deadly weapon, saying, "I want to see you a minute," and deceased replied "all right," and then a mutual intent to have a rencounter existed, and both, with weapons, fought, and he killed the deceased, then it could not be less than manslaughter, no matter who shot the first time, or whether the prisoner retreated or not, for as Sir Michael

Foster says, p. 295: "This is holden to be manslaughter for it was a sudden affray, and they fought upon equal terms, and in such combats upon sudden quarrels it mattereth not who gave the first blow."

No man under the protection of the law can be the avenger of his own wrongs. If they are of such a nature for which the law of society will give him an adequate remedy, thither he ought to resort; but be they of what nature soever, he ought to bear his lot with patience, and remember that "vengeance belongeth only to the Most High."

Now, according to the whole charge of the judge, the issues of murder, manslaughter and justifiable homicide were submitted to the jury. The charge on the whole contains a correct exposition of the law as applicable to the facts of the case, and we see no material error.

Nor do we think he erred in his charge concerning reasonable doubts, the jury having before them all the evidence; and it appears to us that the motives of the defendant were not pacific, armed with that self-cocking pistol, ready and powerful in fight, an ensign not of peace; with both hands in his pockets, on or near the deadly weapon, sought the deceased, and within a minute or thirty seconds, the tragedy was over—so quick, and the conversation so short and incoherent, that the nearest observer could not understand the whole of it, left the question of self-defense without sufficient evidence to support it.

We, therefore, affirm the judgment of the court refusing a new trial.

BROCK *vs.* THE STATE OF GEORGIA.

The commissioners in Gwinnett county—like the ordinary in a county where there are no commissioners—have power to grant or refuse a license to retail liquors. If a license is arbitrarily refused, the remedy is by mandamus; and such a refusal does not give the right to retail without a license,

Criminal law. County matters. Before Judge ERWIN.  
Gwinnett Superior Court. March Term, 1880.

Reported in the decision.

JNO. A. WIMPY, for plaintiff in error.

A. L. MITCHELL, solicitor-general, by brief, for the  
state.

JACKSON, Chief Justice.

Cal Brock was indicted for the offense of retailing spirituous liquors without license, and was convicted. A motion for a new trial was refused him, and he brought the case here. The evidence is conclusive that he sold the spirits, and the only point he makes is that he is not guilty, because he made application for license, and the commissioners of Gwinnett county refused to grant it, though he offered to pay for it and comply with the terms of the law.

By the local act of 1872, creating that board of commissioners, they are invested with the same powers that the inferior court possessed prior to the constitution of 1868. Acts of 1872, p. 423.

That court had the power to grant or refuse license. Code of 1863, section 1377. It was, therefore, lawful for the board to refuse the application.

The ordinary has the same discretion now in counties where there is no board of commissioners empowered to

*Dwinell vs. Brown.*

act on the subject. Code of 1873, §1413. So that there is nothing in the point, and the judgment is affirmed.

Even if the commissioners arbitrarily refused the license, the defendant's remedy was by mandamus. He had no right to retail, and when he did so for any reason without license, he committed an offense against the criminal laws.

Judgment affirmed.

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DWINELL vs. BROWN.

One in possession of land under a claim of right renting it to a tenant who enjoys the full term of the lease without being interrupted or required to attorn to another, the tenant cannot recover back the money paid to his landlord, though the same land may afterwards be recovered from his landlord by action of ejectment, or by a voluntary surrender thereof to a superior title without suit.

Landlord and tenant. Actions. Contracts. Before Judge UNDERWOOD. Floyd Superior Court. March Adjourned Term, 1880.

To the report contained in the decision it is only necessary to add that Brown & Lumpkin brought complaint against Dwinell on an account for money had and received, that the jury found for the plaintiffs, and the court refusing a new trial, the defendant excepted. Brown succeeded in the firm, and was the real party to the suit.

J. BRANHAM, for plaintiff in error.

J. H. REESE; C. D. FORSYTH, for defendant.

CRAWFORD, Justice.

Dwinell, the plaintiff in error, being in the possession of certain real estate in the city of Rome, rented to Brown & Lumpkin the right to build upon it a meat market, for

which they were to pay him \$5.00 a month, with the right reserved to them of removing the building, unless they were in arrears for rent, then it was to be subject to the payment of the same. In pursuance of this contract the building was put up, used and occupied as a meat market, and most of the rent paid upon it until the lot was sold, at which time the rent contract was to terminate.

The lot, after this sale, was surveyed, and it was then ascertained to be no part of Dwinell's as it had been theretofore considered. Brown having the whole interest in the assets of the firm, then brought suit to recover the amount of money paid over to Dwinell for rent, and the question in this case is, whether he is legally entitled to recover it back?

The testimony shows that Dwinell was at the time of the renting, and for some time before, in the possession of the land, claiming it in good faith, using it as his own, and realizing from it an income. That Brown & Lumpkin after the renting, entered, cut away a part of Dwinell's improvements, built upon and used the premises to the end of their contract, and paid all except a small part of the rent money.

Upon this state of facts our judgment is that they cannot recover; they got what they bargained for, enjoyed the benefit of their contract without interruption for the time agreed on; there was no fraud, or deceit, or bad faith on the part of Dwinell, and no reason therefore on their part for complaint. Besides, they were his tenants, and unless they were disturbed in their possession, or had been called upon and required to attorn to another, they could not have defeated him in the collection of his rents. Even if it be true that he rented them the right to occupy land which he thought he owned, but did not, that is a matter with which they had no concern so long as he protected them in its enjoyment, and against the claim of whomsoever might be the true owner. The contract between them has been fully executed, they receiving the

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 Willingham vs. Field.
 

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use and occupation of the land, and he the money for the same.

One in possession of land under a claim of right, releasing it to another, who enjoys the full term of his lease without being interrupted, or required to attorn to another, cannot recover back the money paid to his landlord, though the same land may afterwards be recovered from his landlord by action of ejectment, or by a voluntary surrender thereof to a superior title without suit.

Judgment reversed.

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### WILLINGHAM vs FIELD.

[JACKSON, J., was providentially prevented from presiding in this case.]

Defendant in *fi. fa.* was the owner of a large estate, but was much involved. His two largest creditors, one of them by mortgage, agreed to bid in his property at marshall's sale, manage and sell it, settle his debts and pay over any surplus to him. He filed his bill against them alleging that all of this had been accomplished, and praying an account, etc. The litigation thus inaugurated resulted in a verdict for the complainant against one of the defendants for \$6,951.76, that he settle with the other defendant out of land not if not already paid, and that certain debts, including the mortgage held by the other defendant be satisfied so far as complainant (the defendant in *fi. fa.*) was concerned. It was decreed accordingly. The defendant against whom the money verdict was found moved for a new trial, and his motion was sustained. The other defendant neither joined in the motion nor has made any of his own, though the decree was rendered in 1873:

*Held*, that the decree was several, the one defendant not being affected by the money verdict against the other, and the latter not being injured by the satisfaction of the mortgages held by the former. Therefore the decree is still of force as against the defendant not moving for a new trial, and his mortgages cannot claim the proceeds of the property formerly covered thereby as against the junior judgment.

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Willingham vs. Field

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Judgment. Decree. New trial. Parties. Before Judge McCUTCHEN. Gordon Superior Court. February Term, 1880.

Reported in the opinion.

W. K. MOORE; I. E. SHUMATE; W. J. CANTRELL, for plaintiff in error.

D. A. WALKER; ABDA JOHNSON; A. T. AKERMAN, for defendant.

HAWKINS, Justice.

This was a money rule to distribute \$17,000.00, in the hands of the sheriff, arising from the sale of the property of J. M. Fields. Elias E. Field claimed the same by virtue of two unenclosed mortgages upon the property sold by the sheriff, and Willingham claimed the same on a junior *fi. fa.* vs. J. M. Field, to the amount necessary to satisfy his judgment. Upon an issue on said mortgages, the jury decided in favor of Willingham, and the court, on the motion of the mortgagee, granted a new trial, and Willingham excepts and says the court erred in granting the new trial; also, that the verdict of the jury was according to law and evidence, and should not be disturbed.

It seems that the identical lands covered by the mortgages which raised the money, were sold by a *fi. fa.* against J. M. Field, not subject to the mortgages, and that the mortgages had been the subject of litigation between J. M. Field and Lewis Tumlin and E. Field in Bartow superior court. Willingham contended before the court and jury that the mortgages could not claim the money for two reasons. 1. The same were still unenclosed and the land was sold not affecting their lien, and, 2d., the mortgages were paid off, satisfied and discharged by a decree in Bartow superior court, and therefore could not claim the funds in preference to the Willingham *fi. fa.*



If the plaintiff is right in these or either of the propositions, then the verdict of the jury ought to stand, this is the controlling question in the case in the view take of it.

It appears that J. M. Field was the owner of a large estate, and was much involved in debt, and that Lewis Tumlin was his security for a large amount, and that Field was otherwise indebted to Tumlin. He was also indebted to his brother, E. Field, and as trustee, for a large amount of the two mortgages mentioned.

In this state of affairs, Tumlin and E. Field, the creditors, J. M. Field, the debtor, agreed that Tumlin and E. Field should buy in the property about to be sold at Marshall's sale, pay the *fi. fa.*, hold and use the property until they could sell the same, pay all the claims, and then turn over to J. M. Field the balance, if any, and also a policy of insurance.

Tumlin and Field did buy the property, take charge of the same, of great value, sold the land, collected the insurance money and had in their possession, mostly in the possession of Tumlin, this large amount, when J. M. Field filed his bill for account and settlement of this trust, alleging many things, and among them, that the said trustees had secured this large estate and money enough to pay all the debts, claims, mortgages, and still had a large amount belonging to him, and prayed a decree for an account.

The judge and the court on the trial of the case rendered the following verdict and decree:

" J. M. Field,	}	September Term, 1873. In Equity.
<i>vs.</i> Lewis Tumlin and E. Field.		

"We the jury find for the plaintiff \$6,951.67 against Lewis Tumlin said Tumlin settling with E. E. Field out of the land notes, if not ready paid, and also declare the Summerlin *fi. fa.*, Field mortgages, debts, and Solomon debt settled as far as J. M. Field is concerned.

Upon which was entered the following decree, stating the case:

"Wherefore it is considered and decreed by the court that the complainant, J. M. Field, recover of the defendant, Lewis Tumlin, the sum \$6,951.76, for which execution may issue, and that the execution in favor of Harrison Summerlin, assigned to Wm. Solomon, and by him to Lewis Tumlin and now controlled by him, be satisfied so far as J. M. Field is concerned, and that the *fi. fa.* of Harrison Summerlin against J. M. Field, assigned to Lewis Tumlin and Elias Field, be satisfied so far as J. M. is concerned, and the mortgage given to E. Field by J. M. Field, and the mortgage given by J. M. Field to Caroline E. Field, guardian, and controlled by E. Field, together with the several notes for which said two mortgages were given, be satisfied so far as J. M. Field is concerned, and that defendant, Lewis Tumlin, pay the cost of this case."

Lewis Tumlin made a motion for a new trial, which motion recites that the same was made on motion of counsel for Lewis Tumlin, and which motion was granted by the court and a new trial ordered. What effect did the grant of a new trial have on the decree as to the co-defendant Field, must depend upon the question whether the decree was several or joint, whether the new trial could be, as to Tumlin, and not affect the declared equity as to Field, his co-defendant. Field was satisfied with the decree. He neither joined Tumlin in his application for a new trial nor made one of his own; though rendered in 1873, he has remained inactive and quiescent ever since—both as to the decree and the enforcement of his mortgage liens, for they still remain unforeclosed. The bill required an account against both defendants as trustees, and the jury in their finding fixed the respective liabilities, rendering a money decree for over \$6,000.00 in the hands of Tumlin, and that the debts mentioned should be satisfied, the two mortgages being owned by E. Field, and fixed the costs by final decree against Tumlin. This is equitable and proper. Each party being liable for his own management of a trust fund, and not for the misuser by a co-trustee. The decree was a several one—E. Field not being affected by the money verdict against Tumlin, nor Tumlin injured by the satisfaction of the mort-

Rountree *et al.* vs. Rutherford, administrator.

gages held by E. Field. The new trial, therefore, did not affect the decree as to Field. By that decree these mortgages were satisfied, and could not participate in the fund raised by the sale of J. M. Field's property, which Willingham had a valid judgment lien. Field took his day in court upon that issue, and having abided by the adjudication there made, he is now concluded in his motion to assert the contrary.

It is well settled that where several are sued at law in equity and a several decree or verdict is had, a trial as to one will not disturb the other. 59 *Ga.*, 49 *Ga.*, 622; Randolph, Va., vol. 1, p. 421; 2 Bibb, 4; Paige, 273; 7 *Ib.*, 221; 11 Wend., 227; Daniel Ch. I. §§1604, 1628.

Judgment reversed.

#### ROUNTREE *et al.* vs. RUTHERFORD, administrator.

1. Where a counter-affidavit has been filed to a distress warrant and the case returned for trial, the defendant may file a plea of bankruptcy if it operates to discharge the debt. The affidavit pleading in such sense as to allow amendment by the admission of a plea of bankruptcy.
- (a) The ruling in 55 *Ga.*, 56, will not be extended.
2. Where a distress warrant has been levied, a counter-affidavit and a bond given for the eventual condemnation money process becomes *mesne*, and the debt may be discharged by the bankruptcy.
- (a) The discharge of the principal would operate to discharge the surety.
3. On the trial of the issue formed under a distress warrant, evidence was admissible to show that the landlord agreed for the tenancy sublet at less than the original price agreed on; but statements of the tenant in the absence of the landlord were not admissible for that purpose.

Distress warrant. Landlord and tenant. Pleading. Amendment. Bankruptcy. Principal and surety. Evidence. Before Judge SIMMONS. Houston Supreme Court. April Term, 1880.

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Rountree *et al.* vs. Rutherford, administrator.

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Reported in the decision.

S. HALL; B. M. DAVIS, for plaintiffs in error.

DUNCAN & MILLER, for defendant.

JACKSON, Chief Justice.

John Rutherford, administrator *de bonis non* on the estate of Charles Thompson, sued out a distress warrant against Charles N. Rountree, which was levied on a tract of land on the third day of October, 1873. Whereupon, on the twenty-second day of October, 1873, the defendant filed a counter-affidavit alleging that the rent was not due and on the same day gave bond, with William Brunson as surety, for the eventual condemnation money. The cause pending on this issue, Rountree asked leave to file a plea that since the counter-affidavit and bond, he had made application to be declared a bankrupt, and was adjudged by the district court of the United States for the southern district of Georgia, to be a bankrupt, on the twelfth day of January, 1874, and on the twentieth day of November, 1877, was regularly discharged by that court from all debts provable in bankruptcy and in existence on the second day of January, 1874, the date of his application. This leave to file the plea was denied by the court, and defendant excepted. Brunson, the surety, asked leave to be made a party and to file a plea to the same effect, alleging his principal's bankruptcy and his discharge thereby, which was also refused, and he excepted. The court then ruled out all testimony in respect to Rountree's bankruptcy, and to this ruling the defendant also excepted. The defendant then offered to prove by Pierce, to whom Rountree had sublet the land it seems, that when he notified Rountree that he, Pierce, would only give \$700.00 for the place for the year 1872, Rountree told him he could not let him have it for that sum without plaintiff's consent

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and when he closed the contract with him for 1872, tree said that plaintiff had agreed to the reduction court would not let in this testimony, and defendant excepted. The court then ruled out all the testimony of defendant in regard to the sub-letting and reduction of the rent by the consent of the plaintiff, and defendant excepted. After verdict, both defendants then filed objections to the entering judgment against them for reason of the discharge in bankruptcy, which was overruled, and judgment was entered up for the amount of the verdict, \$897.00 principal, with interest from January, 1873, to which they excepted. Error is assigned on all of these rulings.

The main questions which must control the case are two—first, can the plea of the discharge in bankruptcy be filed in this proceeding—it being a distress warrant and counter-affidavit, under §4083 of the Code, and secondly—if it can be set up as a defense in this case, is the debt discharged by the discharge of bankruptcy? In other words, is this distress so levied and carried into execution by counter-affidavit *mesne* or final process? If the former it is discharged, if the latter it is not discharged.

1. We are of the opinion that the discharge in bankruptcy can be pleaded in this proceeding, if it operates to discharge the debt, because a discharge of the debt is a plea that it is no longer a valid and subsisting debt, and therefore is not due. In 23d *Ga.*, 44, it was held that a set-off could not be pleaded, because that plea admitted that the rent was due, yet in that very case partial failure of consideration was permitted to be pleaded and proved, and the case was reversed because the court had excluded the testimony to show it, the partial failure, on the ground that it was parol evidence and would vary the rent.

In 48 *Ga.*, 173, recoupment was allowed to be pleaded, grounded on the failure of the landlord to repair the roof of the store, whereby the tenant's goods were damaged.

It is true that in 55 *Ga.*, 56, on the issue made

counter-affidavit under section 1991 of the Code to foreclose a factor's lien, it was held that the affidavit made the sole issue and could not be amended; but that is a judgment of a majority of the court and not therefore absolutely binding on this court, though it did bind the circuit judge if applicable to the facts here. That was another affidavit, this is a plea in form and substance; and though the intimation and reasoning then would apply the principle to a case like this, this court, as now constituted, are unanimous that the ruling there should not be extended. We hold that the counter-affidavit merely made one issue with the affidavit to distrain, and that it, in that sense, is pleading, and that all pleadings are amendable by adding thereto new pleas or amending the old one. Therefore we think that if the plea was valid—that is, if the discharge in bankruptcy discharged the defendant from paying this debt, it should have been allowed—just as in the 23 *Ga.*, failure of consideration, and in the 48 *Ga.*, recoupment was allowed. A debt paid is no longer due; a debt discharged by bankruptcy is to all intents and purposes the same. A debt, where the consideration fails, as in the 23 *Ga.*, is no longer due, and where the landlord has failed to repair and damaged the tenant, as in the 48, it is not due in whole or in part by the express ruling of this court; and we are unable to see that discharge from the debt on account of bankruptcy of defendant is less evidence that the debt is not due, than payment, or failure of consideration, or failure to repair the rented tenement.

2. The question then comes back to this, did the bankruptcy of defendant relieve him from paying this debt? If the process was final it did not; if *mesne*, it did. U. S. Stat., § 106—46 *Ga.*, 257. The process was not final under the facts here. The levy fell when the bond was given. The amount due was not fixed until the eventual condemnation money was ascertained. Final process is process to make the money after judgment. Here there was

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Rountree *et al.* vs. Rutherford, administrator.

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no judgment of any court until that which is now complained of. This became merely process to bring the parties into court, and in no conceivable sense, after being brought in court, was it final. It was not final as to the amount of money to be realized, nor as to property out of which the debt was to be paid. That property, usually personal property, is replevied and gone. Personal security is taken, and that not for its forthcoming, but for the EVENTUAL condemnation money. It is true that if the counter-affidavit had not been taken, the property would have been sold under the distress, and in that case, and in one sense, might be deemed final. But it became only *mesne* process when arrested by the counter-affidavit, and the lien was gone.

We are of the opinion then that the court erred in not granting leave to the defendant to file the plea of discharge in bankruptcy. If the principal was discharged and no eventual condemnation money could be adjudged against him, of course no judgment could be entered against the surety whose obligation was to pay the eventual condemnation money of his principal, and only that money, 38 *Ga.*, 224.

This view of the case makes it unnecessary to decide whether the surety had the right to be made a party or not. If any judgment should be rendered against him for money which his principal was not bound to pay according to law, it would be invalid and harmless if he were not a party, and illegal if he were one.

Of course, when the plea was rejected by the court, no evidence under it was admissible; but we think the plea should have been allowed, and then the evidence would have been admissible.

3. The conversation between Rountree and Pierce in the absence of Rutherford was inadmissible to charge or affect him; but any legal testimony going to show that Rutherford had agreed to the sub-letting by Rountree to Pierce at a less sum than he had let the land to Pierce at,

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Gilbert *vs.* The State.

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as admissible so far as this record shows the facts to have been, and we are not at liberty to consider other facts which may have been before the court below and may have controlled his ruling on this point.

The case will turn on proof of the plea of defendant's discharge in bankruptcy, which he should have been allowed to make, and if legally proven it will operate to discharge both principal and surety from the debt, and the other questions become immaterial.

The judgment is reversed on the ground that the court erred in not allowing the defendant to plead his discharge in bankruptcy, and a new trial is awarded on that ground. Judgment reversed.

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#### GILBERT *vs.* THE STATE OF GEORGIA.

It is a general rule that a defendant cannot be charged with separate and distinct offenses in the same indictment; but offenses which are of the same nature, and differ only in degree, may be joined in an indictment. Further, there are some offenses, though not of the same nature, which may be incorporated in the same indictment if they constitute but one transaction, but not otherwise. Of this class is larceny and burglary occurring together. But even then the allegation is more to fix and establish the burglary than to charge the larceny.

If two distinct offenses are charged in the same indictment, and no exception is taken thereto by demurrer, the defendant may, nevertheless, demand that the state elect on which it will proceed. If the indictment shows the difference in the charges, the election may be made when it is read; if the difference appears from the evidence, the election may then be made; but it must be called for before the defendant opens his case.

Criminal law. Indictment. Practice in the Superior Court. Before Judge SIMMONS. Bibb Superior Court. October Adjourned Term, 1879.

Reported in the decision.



W. G. SMITH; WASHINGTON DESSAU, for plaintiff in error.

C. L. BARTLETT, solicitor-general, for the state.

CRAWFORD, Justice.

The plaintiff in error, Mary Gilbert, was tried for burglary, larceny from the house, and for receiving stolen goods knowing the same to have been stolen, under one indictment, and was found guilty of the latter offense. She moved for a new trial, which was refused, and she, by her counsel, excepted.

The indictment under which she was convicted, contained but two counts, by the first of which she was charged with burglary and larceny from the house, by the second, with receiving the stolen goods.

The principal ground relied upon in the motion for a new trial was, that after the reading of the indictment to the jury, counsel moved the court to compel the state to elect under which count it would proceed to try the defendant, which motion was overruled by the court, and the defendant excepted. After the introduction of the evidence and before argument to the jury, the same motion was renewed, and again refused by the court, and the defendant again excepted.

1. A general rule in criminal pleading is that a defendant cannot be charged with separate offenses in the same indictment, as for instance larceny in one count, and perjury in another, for it would embarrass him in his defense, but the same offense, that is the same species of offense, may be charged in different ways in several counts to meet the evidence. Arch. Cr. Pl., 30, 31; Hale P.C., m. p. 246, 1 Bishop Cr. L., 1062; 57 *Ga.* 66.

Offenses differing from each other may be included in the same indictment, provided they are of the same nature and differ only in degree. 11 *Ga.*, 92; 12 *Ib.*, 316; 40 *Ib.*, 534. There are some offenses, however, though

they may not be of the same nature, yet may be incorporated in the same indictment, if they constitute but *one transaction*; of this class is burglary and larceny, if committed at the same time. But as they are not similar in character they can never be joined except when blended by the concurrent acts of the offender, and even then it is done more to fix and establish the burglary than to charge the larceny.

2. The indictment in this case charges the defendant with these two distinct offenses in the first count, but to this no demurrer was made, no ruling by the judge had thereon, and therefore we need not consider it.

But the second count charged the defendant with a misdemeanor, that is of receiving stolen goods knowing them to have been stolen by King Gilbert, who had fled from the country, and could not therefore be prosecuted and convicted. Here, then, was presented to the judge and the jury an offense wholly dissimilar from burglary in its nature and characteristics. One is accomplished by the presence and use of active force in the breaking and entering, whilst in the other is an utter absence of every element of burglary, as well as a transaction totally distinct in time, place, circumstances, grade and punishment; one a felony, the other a misdemeanor. Had the indictment been only for larceny from the house, and for goods under the value of fifty dollars, then to that might have been joined the count for receiving stolen goods, because they are of the same nature. But the right to join larceny from the house with burglary, springing as it does out of the fact that the larceny is a part of the same criminal act, does not and cannot carry with it the right to join another and distinct crime of a wholly different nature, having none of the elements of burglary and forming no part of that criminal act.

Besides, if all this be error, it will hardly be denied that the right of election existed, even with demurrer waived, in an indictment joining a felony and a misdemeanor, if

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not before testimony offered, certainly afterwards, when it appeared that the larceny proved showed that it was only a misdemeanor, the goods stolen being less than fifty dollars in value. We think, therefore, that the defendant was entitled to demand that she should be tried upon one or the other of these two counts as they stood and that the judge should have so ruled. As to the time when it is to be done, the decisions have by no means been uniform; our judgment is that if it appears from an indictment it may be done upon its reading to the jury; if from the evidence, when that shows the existence of different transactions and different offenses; all the authorities, however, agree that the election should be required before the prisoner opens to the jury his defense. Bishop on Cr. Procedure Vol. I. §462.

Judgment reversed.

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BELL & COMPANY *vs.* THE SINGER MANUFACTURING COMPANY.

A court of equity has the power to enjoin the publication and circulation of a libel. This principle is applicable to equitable rights arising under the patent laws of the United States, where the validity of the patent is not the subject of inquiry but is only collateral to the relief sought. Under the facts of this case the discretion of the chancellor in refusing the injunction was not abused.

Injunction. Libel. Patent-right. Before Judge HILLIER. VER. Fulton County. At Chambers. July 26th, 1881.

Reported in the decision.

HOKE SMITH; JOHN A. WIMPY, for plaintiffs  
error.

HENRY HILLYER; HOPKINS & GLENN, for defend-

HAWKINS, Justice.

This was an application for an injunction before his honor, Judge Hillyer, of the Atlanta circuit. The bill charged as follows:

1. That your orators are merchants and traders, dealing in the buying and selling of sewing machines, and more especially of a machine known as the Stewart Sewing Machine, and which is manufactured by the Henry Stewart Manufacturing Company of New York, and is sold exclusively by said company to your orators and no one else, in the states of South Carolina, Georgia, Alabama and Florida; that your orators have been doing a large business in said states in the sale of said Stewart machines, amounting to sixty-five thousand dollars, or some other large sum per annum; that in building up said trade in said states your orators have spent large sums of money and much labor and time, and have secured a large patronage in the business.

2. That the said Singer Manufacturing Company, by its officers, agents, servants, attorneys, workmen, employes and confederates, in order to injure, damage, harass and oppress your orators in their business of selling and disposing of the said Stewart machines, as purchased from said Henry Stewart Manufacturing Company, to their patrons and customers in said states of South Carolina, Georgia, Florida and Alabama, has been since the fifteenth day of May, 1880, and is now wrongfully and maliciously interfering with and injuring the sale of said Stewart machines by your orators, by threats and misrepresentations to the public and the customers of your orators, by falsely and maliciously publishing and printing a letter entitled, "Circular Letter No. 77," and signed by the defendant, which has been delivered to all of its agents, and by them to the customers who buy by the wholesale from your orators said Stewart machines; that in said Circular Letter, No. 77, the said defendant declares falsely and

maliciously, that "all persons making, selling or using a machine in violation of the letters patent of the said defendant will be liable as infringers, and may look to be prosecuted accordingly; that suit has already been brought, and an injunction in the case of the said defendant against the said Henry Stewart Manufacturing Company, and its officers (meaning the officers and agents of the defendant) has been requested for the present to furnish us with the names of all parties in your territory, who are offering to sell the Stewart machine, that they may be served with proper legal notice; as this notice is in the form of an injunction that will effectually restrain the further sale of said Stewart sewing machines it is important to you and to us, that the names called for be furnished forthwith," all of which will more fully appear by reference to a copy of said Circular Letter No. 77 hereto attached as a part of this bill marked "Exhibit A," which your orators pray may be taken as a part of this bill of complaint, and beg the usual leave of reference to the same.

3. Your orators aver and charge that they have not, and are not now infringing upon the patent right of the said defendant in buying and selling said machines; nor have the customers of your orators in the said states done so at any time in the buying and selling or using said Stewart machines, and that all the statements, falsely and maliciously made in said Circular Letter No. 77, going to show that your orators or their customers have no right to buy and sell or use said Stewart machines, are absolutely false in every particular, and that the statement that your orators and all persons are restrained from buying, selling or otherwise using said machines are false and malicious, and no such injunction in fact exists against your orators or their customers, or against the said Henry Stewart Manufacturing Company, in said states, and the said Circular Letter No. 77, and the statements therein contained have been sent out and circulated among the customers of your orators for the purpose of alarming them

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threats of litigation, and thus breaking down the business of your orators.

4. Your orators further charge that the said defendant, by its officers, agents, servants, attorneys, workmen, employees and confederates, are falsely pretending to serve an injunction from the circuit court of the United States for the southern district of New York in its favor, against the said Henry Stewart Manufacturing Company, and is serving a printed copy of the same upon all the customers of your orators; and upon all persons who are buying, selling, or otherwise using said Stewart machines, a copy of which is hereto attached and marked "Exhibit B" of this bill; and your orators pray that the same may be taken as a part of this bill of complaint, and also beg the usual leave of reference thereto when necessary. That the said defendant, by its agents, by serving said injunction on the customers and patrons of your orators and all persons using said machines, they falsely and maliciously represent to them that the same is of force in said states of Georgia, Florida, South Carolina and Alabama, and if they violate the terms of the same, they will be proceeded against for a violation of said pretended injunction, by means of which the customers and patrons of your orators are alarmed and are refusing to buy said sewing machines from your orators, when heretofore they have bought largely. Your orators aver that, as stated above, there is no injunction of force against your orators, or their customers, or against the said Henry Stewart Manufacturing Company in said states, or any other proceeding that prevents your orators and all others who buy, sell or otherwise use said Stewart machines from buying and selling said machine in said states.

5. That the said defendant is manufacturing sewing machines and selling the same in the said states of South Carolina, Florida, Georgia and Alabama, and has a patent right on some particular portion of the machines made and sold by it, and that there is no part or parcel of said Stew-



art machines which is an infringement on the patent right of the defendant.

6. That by the wrongful and fraudulent acts, as above set forth, of the defendant, your orators have been, and are now being, greatly damaged, to the extent of almost breaking down of their business, which damages, caused as aforesaid, are irreparable and cannot be ascertained by a court of law.

7. That the said defendant is a non-resident corporation, and organized under the laws of the state of New York, or some other state, and having a place of business and an office in the city of Atlanta, county of Fulton and state of Georgia.

8. All of which actings and doings are contrary to equity and good conscience, and tend to the manifest wrong and oppression of your orators.

9. In tender consideration whereof and for as much as your orators have no adequate and complete remedy at law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relief obtainable, your orators pray that a writ of injunction be granted and issued by your honor perpetually restraining and enjoining the said defendant and its officers, agents, servants, attorneys, employes and confederates, and each and every one of them, under a certain penalty to be named by your honor, from publishing said "Circular Letter No. 77," and circulating the same, and from interfering in any way with the business of your orators in the sale of said Stewart machines to others by threats of prosecutions, and suits, and misrepresentations, as set forth in "Exhibit A" of this bill, and further, from interfering with the business of your orators by printing and circulating copies of said pretended injunction as set forth in "Exhibit B," and serving the same on customers of your orators, and all who buy, sell and otherwise use the said Stewart sewing machines.

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10. And your orators pray for such other and further relief in the premises as to your honor may seem meet.

The following exhibits were attached :

"EXHIBIT A."

"Circular Letter No. 77.]

"OFFICE OF THE SINGER MANUFACTURING CO.,  
NO. 42 MARIETTA STREET.

"All Communications for this Office should be addressed to the Singer Manufacturing Company, Atlanta, Ga.

ATLANTA, May 15, 1880.

"DEAR SIR :

"It has been decided by the Courts that the Singer Machine, in its present form, is protected by a good and valid patent, and this patent The Singer Manufacturing Company is determined to enforce. All persons *making*, selling, or using any infringement of the same, will be liable as infringers, and may look to be prosecuted accordingly.

"Suit has already been brought, and an injunction granted, in the case of the Henry Stewart Manufacturing Company; and you are requested, for the present, to furnish us with the names of all parties in your territory, who are offering to sell the *Stewart* Machine, that they may be served with proper legal notice.

"As this notice is in the form of an injunction that will effectually restrain the sale of said machines, it is important to you and to us that the names called for be furnished *at once*.

"Very truly yours, THE SINGER MANUFACTURING CO."

"EXHIBIT B."

"*United States Circuit Court, Southern District of New York.—In Equity.*

The Singer Manufacturing Company,

*vs.*

"The Henry Stewart Manufacturing Co. and Henry Stewart." }

"On reading and filing affidavits, and after hearing Livingston Gifford Esq., and George Gifford, Esq., for complainant, and William H. McDougall, Esq., for defendants, it is now, on motion of Gifford & Gifford, Solicitors for Complainant, Ordered, that a preliminary injunction issue against the said defendants, pursuant to the prayer of the bill of complaint in the above entitled suit.

SAML. BLATCHFORD.

T. W. S.

A Copy.

JOHN I. DAVENPORT, *Clerk.*'

(SEAL.)

Here follows the formal injunction.



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To which application the defendant, The Singer Manufacturing Company, filed objections to the granting the injunction by way of demurrer thereto on three grounds: 1. No equity in the bill. 2. Complainants do not state a cause in the bill that is relievable in equity. 3. The court has no jurisdiction of the subject matter stated in the bill.

Also filed answer in which it admitted the publication of Circular No. 77, but denies its circulation was false or malicious, but so published it because it believed and still believes it had the legal right to publish and circulate it.

The statements are true, suit had been commenced and injunction granted, as stated in the letter.

The letter was only published and circulated among its agents, and the object was to obtain the names of persons who were selling, or offering to sell, the Stewart machine, in order to serve those parties with notice of the injunction and the proceedings of the court in New York.

Defendant believed in good faith that such service would make the injunction operate upon persons so served, and it had no other purpose in using either the letter or injunction than to protect its own business by means it thought and believed to be lawful and proper.

Complainants further amended their bill, in which they charge that as a result of the circular letter they are seeking to enjoin, complainants' business is almost ruined. They had taken years to establish it, and almost in a day it ceases, and that since the temporary injunction in the state of New York, defendant has taken no steps to serve the same or to commence proceedings against complainants, etc.

Complainants further amended the bill by charging that the injunction granted in New York was applicable only to a small tension formerly used on the Stewart machine, but since said injunction was granted a new tension has been used, and no machine has been sold by complainants since said order was granted, on which was used the

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Smith *vs.* Shaffer & Ham, for use, etc.

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tension in dispute, and that defendant knew these facts but intended to mislead the public and injure complainants in the circulation of the letter aforesaid.

The chancellor, after argument, refused to grant the injunction prayed for, and this is the only error complained of.

We recognize the rule that a court of equity upon a proper case has the power to enjoin the publication and circulation of a libel, and that the principle is applicable to equitable rights arising under the patent laws of the United States where the legality of the patent is not the subject of inquiry, but the patent right is only collateral to the relief sought. But in this case, after a careful examination of the bill, amendments thereto and the answer of defendant, we think there was no abuse of the legal decision of the circuit judge in refusing the injunction.

Judgment affirmed.

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SMITH *vs.* SHAFFER & HAM, for use, etc.

Where an action *ex contractu* was brought in the superior court for one hundred and fifty dollars, and without any plea of set-off, recoupment or payment pending suit, the verdict was for \$25.00 "and costs of suit," on motion the court should have taxed costs against the defendant as in a justice court, and ordered the balance of the costs to be retained out of the recovery. The finding of the jury for costs will be construed in such a case to mean legal costs.

Practice in the Superior Court. Costs. Before Judge LESTER. Forsyth Superior Court. February Term, 1880

Reported in the decision.

H. L. PATTERSON, by A. C. KING, for plaintiff in error.

J. M. TOWERY; MARLER & PERRY, for defendants.

JACKSON, Chief Justice.

The plaintiff in error was sued by the defendants in error for services rendered in performing a surgical operation on the son of the former. The amount for which they sued was one hundred and fifty dollars; their recovery was twenty-five dollars. The suit arose *ex contractu*, and there was no plea of set-off or recoupment or payment pending suit, but the sole issue seems to have been what was the price agreed upon for the service rendered, and on that issue the verdict of the jury was twenty-five dollars and costs of suit. Whereupon the defendant below moved the court to restrict the costs to the amount of costs which would have been incurred in the justice court, and to authorize the retention of the remainder of the costs out of the sum recovered by plaintiffs. The court refused to grant the motion and this is the error assigned.

Section 3678 of the Code is as follows: "When any action *ex contractu* shall be brought to the superior court, and the verdict of the jury, unreduced by matter of set-off or payment pending the action, shall be for a sum under fifty dollars, the defendant shall not be charged with more costs than would have necessarily accrued if such case had been before a justice of the peace; and the remainder of the court charges shall be paid by the plaintiff, and may be retained out of the sum recovered by the plaintiff, and if that is insufficient, judgment shall be entered by the court against such plaintiff for the balance."

The statute seems plain and imperative. The jury found less than fifty dollars. It is true they also added "and costs of suit," but these words mean legal costs. 5 *Ga.*, 452. The case in 19 *Ga.*, 549, was one sounding in damages and full costs were there allowed for that reason, and only for that reason. Besides, that was before the Code operated. The court below therefore erred in denying

the motion of the plaintiff in error, and the judgment is reversed.

The plea that defendant's son was over twenty-one years of age is immaterial to the point here, and besides, if considered by the jury, was found against defendant below.

Judgment reversed.

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SMITH vs. COKER.

1. Where plaintiff in ejectment claimed title to land under a sale made by a commissioner appointed by decree of a court of equity, and the defendant by virtue of a deed from a defendant in the equity case, the record of the proceedings in equity was admissible both to show the origin and foundation upon which the chancellor exercised jurisdiction and granted the decree, and also to show that the purchaser bought *pendente* title.
2. If a purchaser buys property directly condemned to sale for a particular debt in a court of common law, and practically the same parties as those to the common law suit carry the property into a court of equity, and there, by decree, sell it, instead of selling under the common law judgment, one who purchases *pendente lite* is as much affected by that sale as if it had taken place under the common law judgment.
3. A court of equity has full power to mould its decrees as to sales so as to meet the exigencies of each case.
  - (a) Whether a sale by a commissioner in equity requires confirmation or not depends on whether the decree ordering it is interlocutory or final. In this case it was final.

Evidence. Equity. Title. Notice. *Lis pendens*: Before Judge CRISP. Sumter Superior Court. April Term, 1880.

Reported in the decision.

HINTON & MATHEWS; J. A. ANSLEY, for plaintiff in error.

B. P. HOLLIIS, for defendant.

CRAWFORD, Justice.

Coker, the defendant in error and plaintiff below, brought his action of ejectment to recover one hundred acres of land in the possession of Smith, which he claimed under a deed made by a commissioner in equity. Upon the trial, to support this title, he offered in evidence the mortgage out of which sprang the equity suit, the judgment absolute on the mortgage, the claim interposed by the wife of the mortgagor and a defendant in the bill, the bill itself and the decree thereon, all of which were admitted over the objection of counsel for Smith, the defendant below, and that ruling is assigned for error.

Notwithstanding there are numerous errors assigned, the whole of them turn upon the relevancy and legal effect of the above testimony.

Worrill bought this, with other lands, from one Parker, who gave him a deed and took from him a mortgage to secure the payment of the purchase money. This mortgage was transferred by Parker to Coker. At April term, 1866, a rule *nisi* was granted, and judgment absolute October term, 1871. On December 19th, 1871 the land was levied upon, and on January 1st, 1872, an agreement was entered into between Coker and Worrill, giving him further time of payment in certain instalments specified and agreed upon, but which were not to affect the mortgage *fi. fa.* in any way, as that was still to remain open and unsatisfied.

In October, 1872, Worrill, to pay Smith a debt which he owed him, sold him the land now in dispute. Worrill failed to pay Coker the money as promised and he advertised the lands for sale, Mrs. Worrill interposed her claim thereto, pending which Coker filed his bill in equity against Worrill and his wife, praying an injunction against waste and mismanagement of the lands, and for a receiver to take charge of the rents, issues and profits, subject to final decree.

At October term, 1878, a decree was had directing the receiver as a commissioner in equity to sell all the land and convey by deed the same to the purchaser, which was done, and it is under this deed that Coker claimed title and the right of possession.

Smith, the defendant in the ejectment suit, having taken a deed to this land in payment of a debt due him from Worrill before the sale of it by the commissioner, claims to have the superior title and refuses to surrender the possession.

1. These being the facts relied upon by Coker, were they not pertinent to the issue, and was not the testimony admissible? It seems clearly so to us, in order to show the origin and foundation upon which the chancellor exercised his jurisdiction over the persons and the subject matter involved in the equity case, thereby clothing him with power and authority to make the final decree. The testimony was relevant also to show that this identical land was in the litigation between Worrill and Coker when Smith bought it.

2. It being then properly admitted, what was its legal effect upon the rights of these parties? There was a judgment absolute condemning this identical land to sale for the payment of this specific debt; there had been a seizure of the same by the sheriff, and pending this levy, Smith accepts a deed to this land in payment of a debt due him from Worrill. His title was therefore subject not only to this fixed lien upon the land, but to such further litigation as might arise out of it between these same parties. It had been in litigation before he bought it, the sheriff had levied upon it for sale; that the sale was suspended did not discharge it from the custody of the law; it was still *subject* to such further litigation as might arise out of it between the parties, and whilst in this legal status he bought it. It did become involved in further litigation arising out of the same cause of action and between practically the same parties, and a court of equity,

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Shattless, guardian, *vs.* Melton.

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upon sufficient allegations took jurisdiction and control of the property itself, and by final decree ordered it sold for the payment of the same judgment lien resting upon it at the date of Smith's purchase. So that the question is, if a purchaser buy property directly condemned to sale for a particular debt in a court of common law, and practically the same parties to the common law-suit, carry that property into a court of equity, and there, by decree, sell it, instead of selling under the common law judgment, is not such purchaser as much affected by that sale as if sold under the common law judgment? We see no reason why he should not be, and if that be so, then the purchaser under the decree gets the superior title.

3. It is insisted in this case that the sale by the commissioner is objectionable, first, because it was a private sale, and second, because it has never been confirmed by the chancellor. To the first objection, we say that a court of equity has full power to mould its decrees so as to meet the exigencies of each case. Code, §4213. To the second, that confirmation may or may not be necessary, as the decree itself shall be interlocutory or final, and in this case it was final.

Judgment affirmed.

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SHATTLES, guardian, *vs.* MELTON.

The head of a family was the proper party to sue for the recovery of a homestead under the act of 1876, in the absence of any good reason to the contrary; and a bill brought by certain beneficiaries to recover the homestead, without any reason being shown why the head of the family was not a party complainant, was demurrable.

(a) A homestead having been sold in 1873, and suit brought by certain beneficiaries to recover it in July, 1876, it was too late in 1880 to amend by making the head of the family a party complainant.

Equity. Homestead. Before Judge CRISP. Upson Superior Court. May Term, 1880.

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Shattles, guardian, *vs.* Melton.

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Reported in the decision.

W. S. WALLACE; HALL & SON, for plaintiff in error.

J. A. COTTEN; STEWART & HALL, for defendant.

HAWKINS, Justice.

On July 23d, 1872, James Shattles, as the head of a family consisting of wife and minor children, had assigned to him by the ordinary of Upson county, a homestead to the lands in controversy.

On the thirteenth day of November, 1873, James Shattles and his wife, with the approval of the ordinary of Upson county, sold the land to one Kenchem Melton, for the sum of \$1,600.00.

In July, 1876, George Shattles, as the guardian *ad litem* of the minor children of James Shattles (his wife having died), brought a bill in equity in Upson superior court against James Shattles and Kenchem Melton, the purchaser, to recover the said homestead lands. The bill alleged the sale of the homestead property by James Shattles and wife, the receipt of the purchase money, and that no part thereof had been reinvested for their benefit, prayed the rescission of the trade and restoration of possession, with recovery of rents, etc.

To this bill defendant demurred on various grounds, and on the trial in 1880, the complainant moved the court to amend the bill by striking James Shattles as defendant and inserting him as complainant, which the court refused, and sustained the demurrer, dismissing the bill upon the ground that the head of a family was the proper complainant in a bill to recover homestead property under the act of 1876, unless some reason was shown why he was not the complainant, and none being shown in this case the bill was improperly brought by George Shattles, the guardian *ad litem*—also if it were allowable



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Howell *vs.* Glover.

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to amend by making the head of the family complainant, it was too late to do so, as late as 1880.

We see no error in the decision of the court below in dismissing the bill. See pamphlet decisions, January term, 1880.

Judgment affirmed.

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HOWELL *vs.* GLOVER.

1. In order for one who has been adjudicated a bankrupt to obtain a stay of proceedings in a case in a state court to await his discharge, notice of such adjudication must be judicially given to the court and application for a stay made. That the court has seen the certificate of the adjudication in other cases, or has personal knowledge concerning it, will not suffice.
2. Where, on account of a misunderstanding between attorneys and their client as to fees, the former had their names stricken from the docket as defending the case, and on the call thereof they declining to appear, there was no response for the defendant, and judgment went against him, it will not be set aside because he expected them to suggest his bankruptcy and apply for a stay of proceedings.

Bankruptcy. Practice in the Superior Court. Attorney and client. Before Judge LESTER. Cobb Superior Court. March Term, 1880.

Howell moved to set aside certain judgments rendered against him in favor of Glover, on substantially the following grounds:

(1.) Because he had been adjudicated a bankrupt prior to the rendition of the judgments.

(2.) Because, at a previous term and in another case, he had placed before the court a certificate of his adjudication in bankruptcy and obtained a stay of proceedings, and thought that it applied to all cases pending against him, and that it would be unnecessary for him to attend court further. The judge certifies that he had not seen the certificate of adjudication in bankruptcy since the

former case, and that bankruptcy was not pleaded nor the adjudication placed before him in this case.

(3.) Because he had employed attorneys, and supposed they would do what was necessary in the case; but they disagreed with him as to the terms of their employment, and had their names stricken from the docket.

(4.) Because, although the cases had been consolidated by agreement, separate judgments were rendered.

Glover answered denying the sufficiency of the grounds of the motion, or that he was in any way concerned in preventing Howell from obtaining a stay of proceedings, or had anything to do with the disagreement between himself and his counsel. He denied the consolidation. By consent, the motion as to all the judgments was argued as one case.

The motion was refused, and movant excepted.

D. & T. B. IRWIN; W. P. MCCLATCHY, for plaintiff in error.

RICHARD WINN; W. T. & W. J. WINN, by A. C. KING, for defendant.

JACKSON, Chief Justice.

Howell made a motion to set aside a judgment rendered against him on several grounds set out in the record. On analyzing these grounds, they will be found to be reduced to but two—first, and mainly, that the judgment was rendered after his adjudication as a bankrupt, and secondly, that he was under the impression that he had notified the judge of said adjudication and thought his counsel would attend to the case, and it would be continued until the final result of his application for discharge as a bankrupt.

1. It appears from the record and certificate of the judge, that no plea was filed, nor was there any application to him of any sort to stay the proceedings in this case.

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Boyd vs. Hand et al.

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Therefore, *Steadman vs. Lee*, 61 Ga., 58, controls this point.

Nor does it help the plaintiff in error that at the term before in *other cases*, the judge had seen the certificate of his adjudication. The court must be judicially informed by some sort of application to stay proceedings in the pending case. What the judge knows by what transpired in other cases, or of his own knowledge, the court does not judicially know in a case pending for legal trial before it.

2. Nor is the party relieved by the failure of his counsel. It seems from the record that they had their names stricken on account of some misunderstanding about fees, and when the case was called did not and would not respond, though their attention was called to the matter.

The plaintiff in error did not appear when called, and the court could not well do otherwise than proceed with the case. At all events, we are not at liberty to control the discretion of the judge.

There does not seem to have been any consolidation of the cases. If there was, it is only matter of costs, and the error, if any, can be rectified by the court below on proper proceedings there.

Judgment affirmed.

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BOYD vs. HAND et al.

A tenant in common acquires no prescriptive right by the use of a way over the common property so long as all of the tenants had an undisputed use of the premises. Where all the tenants in common in a certain lot united in a deed conveying the fee, without any reservation of a private way, one of them who had been accustomed to use a way over the land could not tack such use pending his joint ownership to his use since the sale to complete his prescriptive right. The conveyance of the fee with warranty and without any reservation of right of way, carried with it any easement he might have had.

**Prescription. Private way. Easement. Estate. Before Judge LESTER. Lumpkin Superior Court. September Term, 1879.**

To the report contained in the decision it is only necessary to add the following :

In the rear of Boyd's residence lot was an open tract of land, and across this he was accustomed to go as the nearest way to the road leading to a grist mill and to his farm. After passing over this land a number of years—at least seven, he testifies—he bought a sixth interest in it. This he held until 1874, when, together with the other joint tenants, he conveyed the land to Price, under whom defendants hold. No reservation of a private way was made. Both before and after this sale Boyd used a way across the land. Adding all the time of such use together, it would amount to much more than seven years; but after the sale to Price, it was only about four years and a half until the way was obstructed.

M. L. SMITH; WIER BOYD, for plaintiff in error.

PRICE & BAKER, for defendants.

JACKSON, Chief Justice.

The plaintiff in error sued the defendants for obstructing his private way. The proceeding was before the ordinary under our Code, sections 737 and 738, who directed that the obstructions be removed. Thereupon the defendants took the case by *certiorari* to the superior court, where the judgment of the ordinary was reversed, and the plaintiff brought the judgment of that court here for review.

That the way claimed by the plaintiff was obstructed there is no doubt, and the single question is, did the plaintiff, under the facts set out in the answer to the *certiorari*, have any right of way over the defendants' land?

The plaintiff is the owner of a house and lot in Dahlonga. In the rear of it is another town lot, which is a part of land lot No. 951. To that land lot the plaintiff held title as tenant in common with others—his share being one-sixth thereof. The lot was sold by all these joint owners in one deed to Price, with warranty, with certain reservations in that deed, but with no reservation in respect to this town lot or any part thereof or any way thereon. Price conveyed the lot No. 951 to Hand, one of the defendants, with the same descriptions and reservations—the deed to him being referred to—and the other defendant acted under Hand in fencing in the town lot, and thereby obstructing the way. The plaintiff has a way out from his lot to the mill and his farm on two or three other sides, but the way over this lot in his rear is more convenient and nearer. He had gone over this lot since 1867, having then put up a gate out of his lot and in rear of his house, to get to his farm and the mill, but since his conveyance to Price he had not made use of the way out of his house and lot for the term of seven years—his deed to Price being made in 1874.

One legal question, therefore, is, can his use of the way, while he held title to the land in fee as tenant in common, be tacked to his use of it since his conveyance to Price, so as to make out seven years' constant and uninterrupted use of it under section 737 of the Code?

Blackstone defines a way to be "the right of going over *another man's* ground." 2 Chitty's Black., 35. The plaintiff in error needed no grant of the right of way over his own ground. He could go where he pleased on it, and use as many ways on it as he chose. Nobody held the land adversely to him, and therefore his user of it as a way could not ripen into a prescriptive title, and he has no grant of a right of way from those to whom he sold, nor did he reserve any when he conveyed. It makes no difference that he had a fee in No. 951 in common with others, and conveyed title with them. His right was to

use all it, just as theirs was to use all of it, until there was a partition. There was no adverse possession of any one of them against another, until some tenant fenced in a part to keep the others out; but no open way could be such exclusive possession, for all could pass over it. Besides, when Boyd conveyed the land with warranty without express reservation, he parted with this easement. Even in case where one sells land adjoining his home and does not expressly reserve the light for his windows, the grantee may build and shut out the light. 2 Wait's Actions and Defenses, 663.

In this case there was no sort of reservation, and the case is stronger in that other portions of land lot No. 951 were reserved, while this lot is not, and nothing appurtenant to it, and no easement of any sort on it.

In addition to this, it may be added that it nowhere appears in this record that any particular way over the lot was specially used by Boyd, but the entire lot being open, he used what part he pleased. A right of way over such open lot, cannot be acquired without more particularity in defining it than appears in this record. On the whole, the judgment is affirmed.

Judgment affirmed.

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DUMAS vs. THE STATE OF GEORGIA.

1. The verdict is not contrary to law or evidence.
2. One of the witnesses testified in brief as follows: About 7 o'clock at night the deceased came to witness' house; went in and sat down by the fire, and held his head with his hands; told witness that his head felt like it was fit to burst open; that he had been shot, and asked witness to get a light and see how badly he was hurt; the latter did so, and found that he was shot in the back of the head; in a few minutes he stated that a couple of darkies got into his wagon about Barnesville, and rode with him down the road, and shot him, and jumped out. Shortly after this he swayed or leaned forward in his chair. Witness made a pallet, laid him on it, and went

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Dumas vs. The State.

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to a neighbor's for assistance. Deceased did not talk further, but afterwards became unconscious and died early next morning :

*Held*, that the declarations of the deceased as to who shot him, made immediately after he had been shot and had fled to the nearest house, were admissible in evidence ; and they have been held admissible, as dying declarations, in 62 Ga., 58.

3. If a juror does not understand one of the statutory questions put to him on his *voire dire*, the court may explain it to him, and that the juror thereupon answers differently, thereby qualifying himself, is no ground for new trial.
4. Where a challenge to the array of jurors had been sustained, and talesmen ordered to be summoned, the fact that some of the same jurors were again summoned is not ground for striking them for cause. If the second panel was illegally summoned, a new challenge should have been made to the array.

Criminal law. New trial. Evidence. Practice in the Superior Court. Jurors. Before Judge HILLYER. Pike Superior Court. April Term, 1880.

To the report contained in the decision it is only necessary to add the following: Leak, a witness for the state, testified as stated in the second head-note. The declarations of the deceased as to who shot him were objected to as not being dying declarations within the rule ; but they were admitted. Defendant's counsel challenged the array of jurors, as not being properly summoned. The challenge was sustained, and the court ordered the coroner (the sheriff being disqualified) to summon talesmen. A number of the former jurors were so summoned ; defendant's counsel moved to strike them for cause ; the motion was overruled.

F S. HARALSON ; J. J. ROGERS, for plaintiff in error.

R. N. ELY, attorney-general ; F. D. DISMUKE, solicitor-general, for the state.

CRAWFORD, Justice.

The plaintiff in error has been thrice tried for murder, and thrice has he been found guilty. Thrice also has his

case been brought to this court, and twice has he been granted a new trial, though not upon grounds involving the merits. Once again he asks this court to review and reverse the judgment pronounced against him, for errors which he alleges to have been committed upon his trial; if they exist, again will it be awarded as though this were his first appearance here.

The complaints which are set up may be inquired of and adjudged under fewer heads than are named in the motion for a new trial.

1. He says that the verdict is against the evidence, against the law, and without evidence to support it.

After a careful examination we cannot bring our minds to the conclusion that these grounds are well taken. The testimony shows that the deceased was in Barnesville on the third day of November, 1877, and late in the afternoon of that day, in his wagon, he started on his way home. About 7 o'clock that night, he sought shelter and protection in the house of a colored man about eight miles from Barnesville, soon after he had been shot in the back of the head in the base of the brain, from which wound he died about sunrise on the following day. His consciousness remained with him but a few minutes after he reached the house, though immediately upon his arrival, having fled for his life, abandoning his wagon and team, he said that he had been shot by two negroes, who then jumped out of the wagon. It was proven that a pistol or gun shot was heard just about the time it was said that this transaction happened. Jeff Childs and the defendant were charged with the offense and arrested. The proof is that they were seen together at different places about Barnesville for two or three days before; that on the evening of the murder about an hour or two by sun, they went into a store together and bought cartridges for a pistol, one calling for them and the other paying the money; the clerk loaded the pistol and handed it to Childs.

The deceased and the defendant in the wagon were seen



late in the evening passing along the road in the direction of the former's home; following behind was also seen a man who was taken to be Childs from his appearance. About dark they were again seen further on the road, defendant and deceased sitting together, the other man immediately behind the deceased in the wagon. Just after they were all thus seen the homicide took place, and about 10 o'clock of that same night the defendant and Childs appeared in Barnesville together in what is known as the wagoners' house and there remained until morning.

On the following day the defendant admitted his presence at the shooting, but denied having anything to do with it, although he said nothing about it whatever until he was arrested. To witness so atrocious a murder, to walk eight miles through a thickly populated district, to spend the night in a neighboring town where the deceased was known, with many other people, and not speak of it, is inconsistent with innocence.

2. The admission of the statements of the deceased when he first reached the house of Leak, was legal under the ruling on substantially the same facts when the case was here before. See *Dumas vs. The State*, 63 Ga., 600.

3. Another error complained of is, that after a juror had answered that he was opposed to capital punishment, the judge said: "Suppose a man should rape a woman?" to which the juror replied; "Give it over again; I misunderstood the question," and then, by his answer, qualified himself, the judge having no right to call him back or suppose a case.

Upon this point the judge certifies that the question asked was to explain to the juror the scope and meaning of the *statutory* question, when he of his own accord interposed and corrected his answer. The juror's response could only have made him objectionable to the state, but not so to the prisoner. The judges must exercise discretion in the conduct of business in their courts,

the duties, obligations and responsibilities of which being oftentimes thrown upon young and inexperienced jurors and witnesses, should see to it that they comprehend the matters in hand.

There was no error in this ground of the motion.

4. Because after the challenge to the array was sustained, and the coroner was ordered to summon talesman, eleven out of the first twelve put upon the prisoner were of those who had been set aside and re-summoned to serve as tales-jurors, and to each of whom the prisoner objected.

Every right which the law gives to a party either in a civil or criminal case should be allowed him. To entitle the party however to such right, he must claim it according to law, *then* complete justice may be done, if otherwise, *then* wrong and injustice may follow. Challenges to the array are allowed for any cause going to show that it was not fairly or properly impaneled, or ought not to be put upon the prisoner. Challenges for cause apply to the juror. If the panel were illegally made up as alleged in this case, we are at a loss to know why a challenge to the array would not have been as readily sustained by the court in the second as in the first instance, but none was made, and the prisoner rested his right to challenge and set aside each juror *for cause*.

To have allowed this, the judge would have permitted the prisoner the exercise of a right under a challenge for cause of which he should have availed himself by his challenge to the array, and thereby given him an advantage over the state, in objecting to such as he did not want, and accepting such as he desired. The exercise of a legal right must be enjoyed as provided by law; to allow it otherwise than so provided, would oftentimes result in a legal wrong, against which courts in the administration of law must always guard.

Judgment affirmed.

## HALLEMAN vs. HALLEMAN.

1. Whether the verdict was contrary to the charge of the court or not, cannot be considered when the charge is not set forth either in the record or bill of exceptions.
2. The act of October 28, 1870, entitled "an act to extend the provision for alimony to the family of the husband, to provide for the custody of the children, and for other purposes connected therewith," is not unconstitutional as referring to more than one subject matter, or as containing matter different from what is expressed in its title. An examination of the act will show that alimony, custody of children, etc., was the only subject matter referred to therein.
3. There is no law which confines a jury in the allowance of alimony to the property owned by the husband at the date of the verdict. The verdict may cover any property mentioned in the schedule.
4. That the verdict allowing alimony to the wife made no provision for the payment of the debts of the husband, does not render it illegal. Possibly the indebtedness of the husband might show the allowance to have been excessive, but the amount of such indebtedness does not anywhere appear. The decree will not be good as against the debts created prior to the filing of the schedule.
5. Under the peculiar facts of this case, the admission of the copy note from Miss Bullard to the defendant was not error. He was shown to have been in possession of one note from her, and in response to the notice to produce he should have shown clearly that it was not the one called for, and also how it came to be written over in pencil and blurred, so as to be unintelligible.
6. Without such note, the network of circumstances surrounding defendant shows his relations to Miss Bullard to have been very suspicious whether he actually cohabited with her or not. His conduct, the amount of property brought by the wife into the coverture, her blameless life and reputation, all justify the verdict.

Alimony. Practice in the Supreme Court. Constitutional law. Evidence. Production of papers. New trial. Before Judge SIMMONS. Houston Superior Court. April Term, 1880.

Reported in the opinion.

DUNCAN & MILLER, for plaintiff in error.

A. S. GILES ; HALL & SON ; DAVIS & RILEY, for defendant.

HAWKINS, Justice.

C. M. Halleman, wife of defendant, on the twelfth day of June, 1879, filed her bill in equity for permanent alimony, in Houston superior court. She alleged that she was married to defendant in 1844. He was a widower and she a young girl. By the marriage two children were born and reared, and all now live apart from herself and husband. At the time of her marriage she owned a large estate, and the land whereon they lived at the separation was brought into the coverture by her.

She sets forth a schedule of \$8,000.00, including this land, of the value of \$4,500.00; she alleges that on the eighth day of April, 1879, on account of his adulterous habits and cruel conduct, she was compelled to leave him, and she is now living in a voluntary and *bona fide* state of separation, and prays for permanent alimony.

The defendant answered the bill, denying the adulterous and cruel conduct, and on the issue before a jury in Houston superior court, a great amount of evidence was submitted on the question of adultery and cruelty, and as to the amount and value of the property; also, as to the amount brought into the coverture by the intermarriage. The jury, under the charge of the court, decreed that the land and stock thereon should be equally divided between the husband and wife—she to have the use of one moiety for life or during separation. Commissioners were appointed in and by the decree to make division in kind, if practicable, otherwise to report to the court.

A motion was made by the husband for a new trial upon several grounds:

1. The verdict of the jury was contrary to the charge of the court, which correctly submitted the law controlling the case.

2. Because the act of the general assembly, approved October 28th, 1870, as embodied in the Code of Georgia, section 1747, under which complainant's proceeding is brought, is unconstitutional, null and void, being in violation of paragraph 5, of section 4, of article 3, of the constitution of Georgia in force at that time.

3. Because the verdict of the jury gives to complainant one-half of certain specific property alleged to have been owned by movant at the date of separation, whereas she was only entitled to recover (if at all) a portion of the specific property alleged to be owned by movant at the date of the verdict.

4. Because the verdict of the jury makes no provision for the payment of the debts existing at the separation.

5, 6, 7. Because the verdict is excessive, contrary to evidence, and contrary to law.

8. Because the court erred in admitting in evidence the copy note from Angeline Bullard to the husband, the existence of a genuine original thereof not having been first shown as required by law.

Several questions were made on the decree, which will be disposed of in the decision of the other points.

1. As to the first ground, that the jury found contrary to the charge of the court, after a thorough search through the entire record, we have not been able to find the charge of the court, and therefore cannot say whether the jury rendered the decree contrary to the charge of the court or in accordance therewith.

2. The second ground, and the one relied on in the argument here, is that the act of the general assembly of the twenty-eighth day of October, 1870, is unconstitutional, null and void, and therefore the equitable proceeding had in this case could not be maintained.

It is insisted here that the said act of 1870 is obnoxious to that provision of the constitution of 1868 contained in sec. 5056 of the new Code, which says, "nor shall any law or ordinance pass which refers to more than one subject

matter, or contains matter different from what is expressed in the title thereof."

The title of the act of 1870 is in these words: "An act to extend the provisions for alimony to the family of the husband, to provide for the custody of the children, and for other purposes connected therewith." The subject matter was alimony—the purpose was to extend the provision for it, to provide for the custody of the children, and for other purposes connected therewith.

By the law as it stood in Georgia at the time the act was passed, there was no express provision for the support and custody of the children except on the application and pendency of a libel for divorce. See Code, sec. 1736 *et seq.* The wife, however, could obtain permanent alimony in three cases, first, of divorce as considered in the former section; second, in case of voluntary separation; third, where the wife against her will is either abandoned or driven off by her husband.

By the act of 1870, provision is made for a more speedy adjudication of her right to permanent alimony, and also for the custody and support of the children.

The evils in the old law were, that the wife living in a state of voluntary separation, abandoned by her husband, or driven from home, was compelled to await the tardy progress of a regular chancery proceeding for her permanent alimony, and if the custody of the children (perhaps her own helpless infants), was involved, be driven to a process by the writ of *habeas corpus* to have those rights settled, and to forego all alimony for the children until a formal decree could be rendered on a divorce suit.

The remedy was to extend these provisions as to alimony to the family, including the right of the wife as before, with a more speedy remedy for its enforcement, and in the same way adjudge the custody of the children and their support. See section 1747. In that view, whether a divorce is pending or not, by the provisions of the act of 1870, the family of the husband, wife and children, or

either, can have permanent alimony granted by a proper decree, and at the same time the right to the custody and companionship of the children be settled. The object of the act of 1870 was not to deal with two or more subjects, but to extend the legislation as to one subject matter, to-wit: alimony. Alimony was the subject and it was competent to provide all necessary laws in relation to the subject matter. It can hardly be said that any other subject matter than alimony, custody of the children, etc., was contemplated by the legislature.

The right of the wife to permanent alimony in the cases given was complete before the act of 1870, but the remedy was inefficacious in supplying the wife with support and maintenance in this terrible exigency, produced by the abandonment of, or cruelty of, the husband, or where a voluntary state of separation existed in good faith.

We think the act of 1870 is constitutional. On that account we think the court committed no error in so holding.

If there is a divorce begun, then the decree will remain in abeyance until a final decree can be had on the suit, and the only difference between the decree obtained in this case, and what the wife could have had before, was in the time of its trial and not the manner thereof, and in this case there were no minor children.

3. The third ground is that the verdict of the jury gave complainant one-half of specific property owned at the separation, when it should have been a portion owned at the verdict. We know of no rule of law that confines the jury in the allowance of alimony to do so out of the property owned at the date of the verdict. The decree may be for money—bank stock, choses in action or other property mentioned in the schedule—the purpose of the law is to afford the wife (in cases where her rights are established) protection, support and competence according to the wealth of the husband—the amount she may

have brought into the coverture, and the wrong she has sustained by her husband's conduct.

4. As to the ground that the verdict of the jury made no provision for payment of debts, we cannot see how that can be illegal, unless it is to show the amount excessive; whether he was indebted much, and how, does not appear; besides, this decree will not be good against the debts created before—and if the husband should be compelled, out of his part to pay debts—his equity for contribution, perhaps, would exist, but for all that appears, the jury did consider that question and decreed accordingly.

There is therefore no error on that point.

5. Did the court commit error in admitting the note in evidence—the original of which Mrs. Halleman alleged she got from the pocket of her husband, from Angeline Bullard—because there was not sufficient evidence of a genuine original?

The evidence on that point was that complainant served defendant with notice to produce the original of a copy letter from Miss Bullard to the husband. He responded that he had no such letter. Defendant's son testified that after the separation his mother showed him the copy of the note from Angeline Bullard to the defendant, and he called his father's attention to it, and showed him the copy, when his father took from his pocket a note which he said was the one, the memoranda of articles she wanted him (defendant) to get, exactly corresponding with the copy, but the rest of the note was obliterated by pencil marks so as not to be read.

There was no explanation submitted as to how or by whom the obliteration was made, the husband and wife both being incompetent to testify. The court permitted the copy note to go in evidence.

On the examination of defendant to the notice to produce the note, it was competent to explain the blurring of the note, and if he knew, to give its contents. Under



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DeLaigle vs. Denham.

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the circumstances, we think the court committed no error in submitting the evidence and the note to the jury, who could judge of the whole matter.

6. Besides, in this case the circumstances as detailed, (without the note) and putting them in the best light for the defendant, exhibit a state of things rather suspicious, and whether he had actual cohabitation with her or not, his persistent refusal to remove her and her two sisters from his place, and when this suit was brought, renting a house for them in Macon, and his visitations thereto at unusual hours, together with her proved general character for lewdness, surrounded him with a net-work of unfortunate evidence from which a jury of his county might infer guilt; much more, might a watchful wife whose peace was in her husband's fidelity, and who was compelled to hear and witness these surroundings and feel assured of his impropriety with Angeline Bullard, to say nothing of his actual guilt. We do not think the verdict excessive.

It appeared that he had other property besides this, that his children were all provided for, and the one-half of this property would not yield more than four or five hundred dollars at the highest; that she is near sixty years old, blameless in her reputation, and raised the child of competency.

We, therefore, affirm the judgment of the court.

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DELAIGLE vs. DENHAM.

1. The decree in this case was in accordance with the finding of the jury
  2. To charge in an equity case that the complainant must show the principal point in dispute by clear and conclusive proof, where the defendant denied the right claimed, was error; especially where the answer of the defendant was not under oath, and discovery was waived.
- (a) Although the court committed some errors in this case, yet the verdict was required by the evidence, irrespective thereof, and the judgment is therefore affirmed.

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DeLaigle vs. Denham.

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Decree. Judgment. New trial. Before Judge SNEAD. Richmond Superior Court. April Adjourned Term, 1880.

Reported in the decision.

A. C. HOLT; J. C. C. BLACK; H. K. MCCAY, for plaintiff in error.

VERDERY & VERDERY, for defendant.

JACKSON, Chief Justice.

This was a bill filed in Richmond superior court by Nicholas DeLaigle against Charles J. Denham, to compel the latter to reconvey to the former certain city lots in Augusta, which had been absolutely conveyed, but for the purpose of securing a debt and in equity a mortgage, as was insisted by complainant, and which had been sold for enough to pay the debt, with a large surplus over. The lots were first mortgaged on July 29th, 1867, by DeLaigle to Denham, to secure the debt, but on his inability to pay it at maturity, on the sixth day of January, 1868, the absolute conveyance was made, the note delivered up, the mortgaged agreed to be canceled, and the following agreement executed contemporaneously with the execution of the deed, on the sixth day of January, 1868:

"STATE OF GEORGIA—Richmond county.

"Know all men by these presents, that I, Charles J. Denham, of the county and state aforesaid, having this day purchased from Nicholas DeLaigle the eighteen lots of land conveyed to said Nicholas by the executors of Charles DeLaigle by deed of record in the clerk's office of Richmond superior court, book V. V., folios 258 and 259, do hereby agree to convey to him, the said Nicholas DeLaigle, his heirs or assigns at any time within six months from the date hereof the said eighteen lots without warranty of title, upon the payment to me, my heirs, executors or administrators, of the sum of eleven hundred and seventy

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DeLaigle vs. Denham.

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dollars, but this privilege of repurchasing the property is not to be extended unless by instrument in writing.

"And I, the said Nicholas DeLaigle, covenant and agree to and with said Charles J. Denham, that in the event that I should not redeem the said eighteen lots of land, that I will, on demand, pay the said Charles J. Denham the sum of two hundred and seventy dollars.

"Witness our hands and seals, January 6th, 1868.

NICHOLAS DELAIGLE, [L. S.]

C. J. DENHAM." [L. S.]

In presence of W. H. BLOUNT,

FRANK H. MILLER, *Notary Public*.

The following questions to the jury and their answers thereto were then had under the act of 1876 :

"1. Was the time for the privilege of repurchasing this property to be extended under the contract between the parties beyond the sixth day of January, 1868, unless in writing? Answer—No. 2. Was the debt of \$900.00 due by DeLaigle to Denham, extinguished by the deed of January, 1868? In other words, did DeLaigle owe Denham said \$900.00 after that time? Answer—No. 3. Was there any instrument in writing between Denham and DeLaigle by which the time for repurchasing was extended? Answer—No. 4. Was the note of \$900.00 upon the making of the deed sixth of January, 1868, surrendered by Denham, or agreed then and there to be surrendered? Answer—Yes. 5. How long has Denham, and those claiming under him, been in possession of said eighteen lots of land in controversy? Answer—Has been in possession since 1868. 6. Did Mr. Denham take possession of the lots of land after the expiration of the six months from January, 1868, and DeLaigle know of that possession, and did he object to the same? Answer to 1st—Yes. Answer to 2d—He did. Answer to 3d—No. 7. Was the transaction on the sixth day of January, 1868, at F. H. Miller's office, intended to be a sale or a mortgage? Answer—We find it a sale. 8. Did Nicholas DeLaigle know of the improvements going on upon the said lots referred to in said bill and answer? Answer—Yes.

9. Did Nicholas DeLaigle ever deliver up to Charles Denham the chain of title to the eighteen lots, at the time of the execution of the deed on January 6th, 1868? Answer—Yes. 10. Was the sum of two hundred and seventy dollars mentioned in the writing dated January 6th, 1868, signed by plaintiff and defendant, or any part thereof, usury? or was it for the privilege of repurchasing said land by plaintiff? Answer—For the privilege of repurchasing said land. 11. Was the conveyance of January 6th, 1868, from DeLaigle to Denham a security? Answer—No. 12. Have any of said lots been sold by Denham? If so, how many, and when and what has defendant received from said sales? Answer—Seventeen have been sold for \$3,030.00, \$20.00 of said amount still due; and one lot unsold, valued at \$150.00. 13. If any of said lots are unsold, what is the value of the same? Answer—One lot unsold; value, \$150.00. 14. If you find that said conveyance was a sale and not a security, was the consideration therefor usurious? Answer—We find it a sale, but usurious.”

Upon these findings the judge, on the seventh day of June, 1880, upon motion of defendant's solicitors, entered the following decree, to-wit:

“In consideration of the verdict rendered during the present term, in the above stated cause, upon certain questions of fact in dispute, submitted at the hearing thereof to the jury; and in consideration also of other facts alleged in the pleadings, not in dispute; and upon consideration of the argument presented after said verdict, it is considered, adjudged and decreed: That the instrument of conveyance between said Nicholas DeLaigle and said Denham, bearing date the sixth day of January, A. D., eighteen hundred and sixty-eight, transferring the land in the bill in this cause described to said defendant in fee simple, was and still is a valid conveyance to him of the title thereto, for his own uses and purposes; and was not, in law or in equity, a security or mortgage.

"And further adjudged and decreed: That the complainant, in respect to the usury in said deed, is barred by the statute of limitations of all right to said land or any part thereof, and also to the proceeds of sale of the same; and is not entitled to recover against said defendant either said land, or proceeds of sale thereof, or any part thereof.

"It is further decreed: That the proceedings in this case be enrolled among the records of this court, and the plaintiff do pay the costs therein."

To this decree complainant, by his solicitors, appeared at the same term of the court at which said case was tried, accepted, and duly tendered his bill of exceptions, which was allowed, certified to be true, and ordered to be put on the record.

At the same term of the court the complainant moved the court to have the verdict rendered in said cause set aside and a new trial granted to him, the grounds of motion being as follows, to-wit:

1. Because the judge erred in refusing to charge the jury the second written request submitted to him by counsel for the complainant, to-wit: "Inadequacy of consideration is a strong circumstance to be considered in favor of regarding such a transaction as the creation of a mortgage. (Equity will never sanction an arrangement in which the right of redemption is surrendered without adequate consideration; that is to say, it must be for an adequate consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity; any marked undervaluation of the property in the price paid will vitiate the proceeding)." The error herein complained of being the refusal of the judge to charge so much of the above request as was embraced in the brackets.

2. Because the judge erred in refusing to charge the jury the third written request submitted to him by counsel for the complainant, to-wit: "The question whether such a

action—that is, a conveyance of land and the contemporaneous execution of a bond to reconvey the land upon the payment of the consideration of the conveyance—creates a mortgage or a mere contract for repurchase, is one of fact (and if doubtful upon the proof, should be decided in favor of its being a mortgage).” The error herein complained of being the refusal of the judge to charge so much of the request as is embraced within the brackets.

3. Because the judge erred in giving in charge to the jury the following written request, made by counsel for the defendant, to-wit: “If the jury believe that at the time of the execution of the deed of January, 1868, in the office of F. H. Miller, Esq., that the note of nine hundred dollars given by DeLaigle to Denham was delivered up, that the title deeds to the property made by the executors of DeLaigle to Nicholas DeLaigle were also delivered up to Denham, and the debt extinguished at that time, then the transaction was not a mortgage, because a mortgage cannot exist without a debt.”

4. Because the judge erred in giving in charge to the jury the following written request made by counsel for defendant, to-wit: “A deed absolute on its face, and accompanied with possession of the property, shall not be proved at the instance of the parties by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried; the fraud alluded to is fraud in procuring the deed, and not fraud in claiming the transaction to be a deed. If you believe, therefore, that possession of the property accompanied this deed, and that the possession was known to and acquiesced in by DeLaigle, then the transaction was not a mortgage but a sale, and parol testimony will not be regarded by you in denial of the instrument.”

5. Because the judge erred in giving in charge to the jury the following written request made by counsel for defendant, to-wit: “Gross inadequacy of price is not of itself any evidence that the transaction was a mortgage.

If you should even find from the testimony that there was such inadequacy, such inadequacy may only be considered among other circumstances in arriving at a conclusion—if you should believe that it was the purpose of the parties to effectuate a sale, it matters not how great the inadequacy is.”

6. Because the judge erred in giving in charge to the jury the following written request made by counsel for defendant, to-wit: “When the answer of the bill denies the right to redeem, proof that the instrument was not a sale must be clear and conclusive.”

7. Because the judge erred in charging the jury as follows, to-wit: “But where, as in this case, there is an instrument which is a deed on its face and an obligation to reconvey, signed by both parties at a fixed sum and at a fixed time, and that time not to be extended except in writing, it is *prima facie* a conditional sale—that is, the presumption arises from the face of the papers that it is a sale and not a mortgage. It is, however, but a presumption, which may be overcome by satisfactory proof that it was a mortgage.”

8. Because the judge erred in charging the jury as follows, to-wit: “If Denham went into possession under the deed, with the knowledge of DeLaigle, and remained in peaceable possession for a number of years, the presumption is that that possession was a rightful one, and is what the terms of the deed purport it to be, under a sale of the land.

9. Because the judge erred in charging the jury as follows, to-wit: “The presumption of mortgage arises where there is an existing debt, a conveyance to secure it, and when once a mortgage the presumption is that it continues to be a mortgage; but this presumption may be repelled by facts showing that the debt was surrendered at the time of the subsequent conveyance. In that event, if such are the facts, then the burden is thrown upon DeLaigle to show that the deed is not to have the effect

of a sale, or conveyance, according to its terms. And although the note and mortgage are not surrendered, if the evidence shows that the debt was absolutely extinguished, a simple right to repurchase within a given time by the payment of money does not make the conveyance a mortgage, for there can be no mortgage without some debt which it is given to secure."

10. Because upon the return of the jury to the courtroom for the purpose of being recharged upon the subject of the adequacy of the consideration, and also upon the subject of usury, the judge erred in adding to his original charge as follows, to-wit; to these words in said original charge, to-wit: "You can, to determine the intention, look to the consideration and see whether the price paid was adequate to the value of the land. It is a circumstance only with other circumstances to which to look to find out the intention." The following words, to-wit, "but if you do believe that the transaction was a sale, it makes no difference how inadequate the consideration was."

11. Because the judge erred in this, that in his preliminary remarks in his charge to the jury he cautioned them that there had been one mistrial in this case, and he wanted them now to make a verdict.

12. Because the judge erred in refusing to submit to the jury, to be passed upon by them, the following question requested to be submitted by counsel for complainant, to-wit: "If you find that the conveyance of January 6th, 1868, was a sale and not a security, was the consideration therefor adequate and fair—that is, would it, the consideration, have been reasonable if the transaction were between other parties dealing in similar property in its vicinity."

To the entering the decree on this verdict and to the refusal to grant the new trial on these grounds error is assigned.

1. The facts found by the jury in our judgment author-



ize the decree. Briefly stated, these facts are that the actual sale of the lots took place, the purchase money being the debt which was canceled, that all the title deeds were delivered up, that Denham went into possession in 1868 and held the lots, selling them and having them built upon and improved under the eye of DeLaigle, from that time to the date when the bill was filed, without protest or objection from DeLaigle, some nine or ten years; that DeLaigle failed to re-purchase or have the time extended pursuant to the contract, and that it was the intention of the parties to extinguish the debt and pass the title absolutely. On these facts the decree would necessarily follow, and the questions, therefore, are, were the issues properly submitted to the jury, and is their finding thereon supported by the evidence?

2. There can be no doubt, we think, that the court below committed error in certain portions of the charge complained of. In requiring the proof to be clear and *conclusive*, when the answer denied the right to redeem—the court erred. The answer was not under oath, discovery was waived, and even if it had been responsive to the bill under a prayer for discovery, all that equity would require to set it aside or overcome it, would be two witnesses, or even one with corroborating circumstances. The rule laid down by the court goes beyond even the rule in criminal cases. To convict requires satisfaction only beyond a reasonable doubt in cases of murder or arson; does equity, to overcome even a sworn and responsive answer demanded by the complainant, require more? Clearly not.

We think also, that inasmuch as the relation of these parties prior to this conveyance in 1868 was that of mortgagor and mortgagee, the court put the *onus* too strongly upon the mortgagor, to show that the latter transaction touching the same lands and the same debt was really a mortgage; and also, in regard to the effect of inadequacy of consideration, in cases where the mortgagee, though in possession, seeks to hold his possession under a subsequent

sale. 12 How., 151; 6 Otto, 332; 7 Cranch, 241; 2 Sum., 535.

Yet though we think that these errors were committed by the court, we do not see the necessity of sending the case back, or on the overwhelming evidence the verdict must be substantially as it is. Let the mortgagee assume the burden as strongly cast upon him as any court could require and it is carried here with ease. Not only the face of the deed, but the intention of the parties, testified to by the survivor as well as the counsel, who respectively drew and advised the transaction of the sixth day of January, and the facts that the title deeds were all delivered up, the mortgage to be canceled and the evidence of indebtedness extinguished, show that the transaction was a sale, so intended by the parties and understood by everybody else.

Besides all this, when we consider the shrinkage of values in real estate from the date of the sale to Delaigle, to the time when the mortgagee or vendee bought, and the fact that the latter, though he sold for over \$3,000.00, and the price of his purchase was a debt of some thousand dollars, sold lot by lot at intervals from year to year for several years, as he could sell to advantage, while he purchased in bulk, and the entire testimony in the record, the price may well be considered adequate.

But beyond all this, when the transaction was all over, when Delaigle knew that Denham was holding adversely, not as mortgagee but as absolute grantee from him, and was selling off and improving the lots—when he was no longer *in vinculis* in any sense of the word, but *sui juris*, not being operated upon to make the conveyance of the sixth day of January, 1868, but for years after the deed was done—stood by and acquiesced in these acts of ownership and improvement without lifting a little finger of warning or objection, the doors of a court of equity will be closed to him, though not quite ten years may have elapsed. Those ten years—Code, §1964—are ten years of

quiet waiting without fraud in the mortgagor, no years in which he acts fraudulently in law by permitting the status of things completely to change, sales to be effected and improvements made, so as to render it impossible to place the parties in *statu quo*.

It must be noted, too, that the mortgagor is the plaintiff and complainant here—it is he that invokes equity and equity will not hear him when his demand is stalled within a fraction of a year of a legal bar of the statute of limitations, and when for nine years and more he has by and acquiesced in a complete revolution of the condition of the estate he had bargained away. In respect of the finding of usury in the deed, which the jury appear to have found in answer to one question and yet to have contradicted that finding in response to another, it is enough to say, first, that the proof is positive that there was no usury, but the additional sum was part of the consideration of the contract to repurchase; and secondly, that a mortgagor may pay in property as well as in money a usurious debt, and when the intention is to pay and pass title, it is not late after nine years to move in relation to it—61 *Georgia*—and the distinguished counsel who argued the case for the plaintiff in error, seemed so to think, for he declined to argue the point.

Believing that if sent back the facts would demand the same verdict substantially, and the principles of equity applied to them would necessitate the same decree, we carry out the oft repeated ruling of this court, that in such a case a new trial will not be granted over the judgment of the circuit court denying it, and the judgment is therefore affirmed.

Judgment affirmed.

## MORGAN vs. MORGAN.

1. Where parties to a rule against the sheriff for the distribution of money claim it in their individual characters, and it appears from the testimony that whatsoever of rights they have arise in their representative capacities, the pleadings should conform to the proof before the same is awarded to either.
2. A tenant at will or his legal representative is entitled to emblements, whether the tenancy is terminated on notice or by the death of the tenant.
3. One renting land from another becomes his tenant although he may not own the land, and the relation of landlord and tenant exists, with liability to pay the landlord or his representative the amount due for rent.

Landlord and tenant. Emblements. Lien. Money rule. Before Judge BUCHANAN. Campbell Superior Court. February Term, 1880.

Reported in the decision.

THOMAS W. LATHAM; GEORGE LATHAM, for plaintiff in error.

L. S. ROAN; G. F. HOWARD, by H. C. PEEPLES, for defendant.

CRAWFORD, Justice.

The parties to this controversy each sued out a distress warrant for rent, which realized a fund that was brought into court for distribution. It appears that one John Henry Morgan has the deed to the land rented, but that Mark Morgan, his brother, has been in the possession, use and occupation of the same from the first of the year 1873 to March 31, 1879, by the owner's consent. It further appears that he, and the owner of the land, lived with their mother, the plaintiff in one of the distress warrants, until he was some thirty years of age, and aided in the

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Morgan *vs.* Morgan.

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general support of the family, and making the property, which seems to have been used very much in common among them. Upon his marriage in 1873, by the consent of his mother and brother, he went upon this land from which the rent was recovered, built houses, cleared, fenced, made general improvements, paid the taxes and remained thereon until on March 31, 1879, when, for reasons which are not material here, he went temporarily into another county, where he died in the July following.

The testimony is that Mark Morgan, this deceased brother and son, and who was in the possession of this land, rented it about the first day of January, 1879, to one Henry North, who entered upon it under the contract and commenced his preparation for a crop. That about two weeks after Mark's departure he signed another contract for rent for the same year for the same land, with Catharine Morgan, remained upon it and made a crop. In the fall of that year, Lettie Morgan, the widow of Mark, as well as Catharine Morgan, distrained for rent, each in her own individual name. On the trial of this rule however, Catharine Morgan testified that she was the general agent of her son, John Henry Morgan, and as such was entitled to the money, whilst Lettie Morgan claimed, that she being the sole heir of Mark, and his administratrix, was entitled. But neither of them had commenced proceedings according to the representative character in which she claimed the fund.

The judge, who by consent tried the case without the aid of a jury, directed the money to be paid over to Lettie Morgan, and Catharine alleges this to be error, and asks that that judgment be reversed.

We do not think, under the law and facts as they appear in the record, that Lettie Morgan was entitled to this rent. There was no contract with her, either expressed or implied, for the rent of this land, yet she proceeded as the landlord with a distress warrant against the tenant, and under it claimed the money.

Catharine Morgan could with much more legal show of right have claimed it, because she did have a contract of rent with the tenant; yet under the proof, she and John Henry both testified to matters which, according to the pleadings as they stood at the trial, showed her unauthorized either to make the contract for rent with Henry North or to sue out this distress warrant.

The case, therefore, must be sent back for a new trial, because the disposition of the money turns upon the manner in which Mark Morgan held the land, whether as tenant at will, or from year to year. If a tenant at will, then whether he either had notice to terminate, or did by his own act terminate the tenancy; and in this connection is to be ascertained his right to emblements as provided by law. If a tenant for the calendar year 1879, then did he make a contract of rent with Henry North, for if he did, then Henry North became his tenant, and was liable to him for the rent he agreed to pay, and this would be so although Mark Morgan might be liable to John Henry for the \$40.00, which it is claimed that Mark was to pay for the use of the land.

Besides, it seems quite settled by the testimony that the tenant, North, made two contracts for rent, and he should be protected, if important to him, and should be allowed to appear and make himself a party to the rule. Indeed, any party in interest is entitled to be heard, and by proper pleadings set up a claim to the fund; thus John Henry Morgan by himself or agent, Catharine Morgan, and Lettie Morgan, as the administratrix and sole heir of her husband, can legally contest with each other over the money.

In the distribution of money by the superior court, where the same is in the hands of its sheriff, even common law courts sit as courts of equity, and especially is that true in this state. 40 Ga., 430.

Judgment reversed.

THE DAHLONEGA GOLD MINING COMPANY *vs.* PURDY.

1. The judgment is supported both by the law and evidence.
2. Where a foreign corporation contracts with a machinist out of the state to come within its limits to do certain work, in case of a breach by the company the courts of this state have jurisdiction of a suit to enforce the machinist's lien as against the property upon which the work was done, located here. The case of *Bawknight vs. The Liv. & Lon. & G. Ins. Co.* 55 *Ga.*, 194, distinguished.

New trial. Jurisdiction. Foreign corporations. Before Judge LESTER. Lumpkin Superior Court. September Term 1879.

Reported in the decision.

PRICE & BAKER; MARLER & PERRY, for plaintiff in error.

WIER BOYD; W. F. FINDLEY, for defendant.

HAWKINS, Justice.

On the twentieth day of March, 1879, H. B. Purdy brought suit on a machinist's lien against the defendant, a foreign corporation, operating a gold mine in the county of Lumpkin.

It appears that the company was incorporated by the legislature of the state of New York, and on the first day of October, 1879, in the city of New York, by parol, employed Purdy, who was an expert machinist, to remove to Georgia and repair and put in good running order the gold mine works of the company; that the company was to pay Purdy fifty dollars and one thousand dollars in shares of the stock of the company per month, said stock to be transferred on the books of the company in New York. The lien was recorded as the law required, and suit brought thereon within twelve months, serving the superintendent of the corporation with process, copy, etc.

At the appearance term of the court the defendant filed pleas of the general issue, tender and forfeiture and damages, and a plea to the jurisdiction of the court.

At the September term, 1879, by agreement of the parties, the cause was tried before his honor Judge Lester as to all matters of law and fact, without a jury, and by order of said court the judge was to render judgment on the case at chambers.

Upon the trial of said cause before the judge, it was proved that said company on the first day of October, 1879, in the city and state of New York, made a contract with Purdy, agreeing to pay him fifty dollars and one thousand dollars in shares of its stock per month, if he would come to Georgia and assist in repairing and running the gold mine property belonging to said company under the superintendent then in Georgia; employed him as a machinist, mechanic, mining engineer and miner. He came to Georgia, entered upon the work and remained until the first of January under the contract, when the contract was changed to \$100.00 per month, without *any shares of the stock*. On the first of March Purdy was discharged, and he brought this proceeding to recover the value of his services. The defendant claimed that the said Purdy could not recover on the contract because it was made in the state of New York, and the court had no jurisdiction to try or give judgment against a foreign corporation upon a contract made beyond its limits. That the defendant had forfeited all interest in the contract on account of intemperance while engaged in the work, insisting that the contract was, that if he became drunk while in discharge of the work he had agreed to forfeit all interest in the wages and shares. That his conduct while in their employment, inducing the hands to quit and to sue the company, and to become insubordinate was, in law, a sufficient reply to his right to recover, with other pleas not here necessary to mention.



The judge, after hearing all the evidence, rendered judgment on the suit against the defendant and the real estate of the company for the sum of five hundred dollars.

The plaintiff in error excepts to the decision of the judge upon three grounds—

1, 2. That the judgment of the judge is contrary to law and evidence and decidedly contrary to the weight of evidence.

3. Upon the ground the judge erred in not sustaining the plea to the jurisdiction of the court.

1. In reference to the first two points, it is sufficient to say that the trial by the judge of all matters of law and fact on the agreement of the parties, invested the judge also with the province of a jury to weigh and decide upon evidence, and his judgment in such a case will not be disturbed when there was sufficient evidence to support it; besides, in this case we think the judgment of the presiding judge is sustained by the evidence.

2. As to the plea to the jurisdiction of the court, which was the main point relied upon, it does not appear by the record or the judgement of the judge that he passed formally upon that question; nor was any motion made to dismiss the same, it appearing from the declaration that the defendant was a foreign corporation. The plea was not filed in person. Nor was it sought to be sustained on motion. See Code, §3462. This may have been the reason the judge did not pass upon the plea formally, but be that as it may, we think that the superior court of Lumpkin county had jurisdiction of the subject matter and could enforce a mechanic's lien on the property of the corporation situated in the state of Georgia. If this be not so his lien is utterly worthless. It certainly could not be enforced in the state of New York.

The case of *Bawknight vs. The Liverpool & London Globe Insurance Company* was relied on here.

In that case plaintiff brought a suit upon a foreign

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Georgia Penitentiary Co. No. 2, *et al.* vs. Nelms, principal keeper, *et al.*

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judgment—one obtained in the state of Florida, and on motion the same was dismissed. The present learned chief justice delivered the opinion of the court in which he uses the following language: "We are not aware of any case which has been decided that a foreign corporation may be sued *in personam* here on a foreign judgment or on a contract or debt of any sort, with which the Georgia agency had no connection." See 55 *Ga.*, 195. Putting the case distinctly upon the ground that a common law or any ordinary suit *in personam* could not be maintained against a foreign corporation on a contract made out of the state.

The case at bar is not a suit purely *in personam*, but is a mechanic's lien created by our law, and can only be enforced in the state of Georgia by the process of the court against the property itself.

This was not a suit to enforce a contract made in New York, but was for damages upon the breach of a contract. The plaintiff in the court below resided in Georgia, did the work in Georgia, by his skill repaired and improved the property of the corporation, and was entitled to have this statutory remedy employed in his behalf.

Let the judgment of the court below be affirmed.

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GEORGIA PENITENTIARY COMPANY, NO. 2, *et al.* vs.  
NELMS, principal keeper, *et al.*

[Jackson, Chief Justice, being related to some of the parties, did not preside in this case. Judge Speer, of the Flint circuit, was appointed by the governor to preside in his stead.]

1. While it is the privilege and right of counsel to ask permission to review and reverse a decision of this court, though unanimous, still the judgment of the court rendered in the case reviewed is not affected thereby. The judgment of affirmance or reversal by this court of the judgment of the court below is not the subject of review by this court.

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Georgia Penitentiary Co. No. 2, *et al.* vs. Nelms, principal keeper, *et al.*

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2. Where an act of the general assembly contains the following provision: "Before any disposition is made of the convicts, the governor is authorized to furnish to the directors of the Marietta and North Georgia Railroad Company, upon their application for the same, two hundred and fifty convicts, or as many thereof as they might desire, without charge, for the space of three years, upon their giving satisfactory obligations to feed, clothe and provide for the same, under such regulations as the governor might require for their safe keeping and proper care:

*Held*, that the same is not such a "donation or gratuity" by the state, within the meaning of the constitution, as requires that such act should have been passed by a majority of two-thirds of each branch of the general assembly, and the yeas and nays on its passage to be entered on the journals thereof.

Practice in the Supreme Court. Laws. Constitutional law. Before Judge LESTER. Cobb County. At Chambers. April 8, 1880.

Reported in the decision.

JAMES M. SMITH; HOPKINS & GLENN, for plaintiffs in error.

MCCAY & ABBOTT; A. JOHNSON, for defendants.

SPEER, Judge.



This is a bill filed by plaintiffs in error seeking to enjoin John W. Nelms, as principal keeper of the penitentiary, from delivering to the Marietta and North Georgia Railroad Company, and said company from receiving, any convicts under a resolution of the general assembly of 1879, "which directed the principal keeper of the penitentiary to furnish the Marietta and North Georgia Railroad Company two hundred and fifty convicts upon certain conditions therein specified."

The complainants allege that by a contract dated 21st June, 1876, the state leased to them all of the convicts (except a certain proportion that was to go to Peniten-

tiary Company No. 1.) for twenty years from and after the first day of April, 1879. The contract of lease of complainants as well as the claim of the two hundred and fifty convicts by the Marietta and North Georgia Railroad Company both are under the authority of and derived from an act of the general assembly approved twenty-fifth day of February, 1876, entitled "an act to regulate the leasing out of penitentiary convicts by the governor, and authorizing him to make contracts in relation thereto."

1. The right of the complainants against the defendants seeking to restrain the delivering by the one, and the receiving by the other, of the two hundred and fifty convicts, under the act of 1876, as will appear from the *original* bill, answers, proofs, etc., was before the court at the February term, 1880, and the judgment of the court below refusing the injunction as to the case *then* made, was affirmed by this court. See case *Georgia Penitentiary Company No. 2, et al. vs. John W. Nelms, keeper, etc., et al.*, pamphlet decisions of supreme court, February term, 1880, p. 14.

In the argument, counsel for plaintiffs in error asked leave to review and reverse the decision made in this case at the last term between these parties. Section 217 of the Code provides that, "A decision concurred in by three judges cannot be reversed or materially changed except by a full bench, and then after argument had, in which the decision by permission of the court is expressly questioned and reviewed, and after such argument the court in its decision shall state distinctly whether it affirms, or reverses or changes such decision." To review and reverse a *decision* made is a very different thing from reviewing and reversing a *judgment* that has been rendered when the case and parties are the same.

In *Russell vs. Slaton*, 38 Ga., 195, the court says: "The judgment of the supreme court in a case is a judgment affirming or reversing the judgment below, and is *final* and *conclusive* between the parties on the matters involved

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Georgia Penitentiary Co. No. 2. *et al. vs. Nelms, principal keeper, et al.*

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in that trial. The *opinion* of the court on the law of the case does not stand on the same footing, and may be overruled after argument had, if shown to be erroneous even if unanimous. The judgment of affirmance or reversal by this court of the judgment of the court below is *not the subject of review*. This is a court of last resort and it would be extraordinary law indeed that would justify such review." 38 Ga., 196.

We have heard the argument of counsel for the plaintiffs in error seeking to reverse the decision pronounced in this case made at the last term of this court, but the reversing of the *decision* could not avail *them* as the *judgment* then pronounced between these parties would be unaffected by such reversal. The judgment then pronounced is final and conclusive between these parties as to the questions involved.

2. In considering and reviewing the *decision* then pronounced, we are satisfied the same should be sustained and affirmed. Since the decision had at the last term, complainants have amended their bill and on said amendment applied for an injunction *again*, seeking to restrain the turning over of the two hundred and fifty convicts to the Marietta and North Georgia Railroad. In said amendment they allege and charge as follows: "That the act of 1876 referred to in the original bill contained this clause: "Before any disposition is made of the convicts as contemplated under the provisions of this act, his excellency, the governor, shall be authorized to furnish the directors of the Marietta and North Georgia Railroad Company, upon their application for the same, two hundred and fifty convicts, or so many thereof as they may desire, without charge, for the space of three years, upon their giving satisfactory obligations to feed, clothe, and provide for the same under such regulations as his excellency, the governor, may require for the safe keeping and proper care of said convicts."

"But said convicts shall be used by said railroad com-

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Georgia Penitentiary Co. No. 2, *et al. vs. Nelms, principal keeper, et al.*

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any exclusively for the benefit of their railroad, and for violation of this condition the governor may vacate the lease."

Under this clause, it is alleged the defendants claimed the right to have the two hundred and fifty convicts for three years from the first day of April, 1879. Complainants further charge that under this clause of the act of 1876, there was granted to the Marietta and North Georgia Railroad Company a "*donation*" or "*gratuity*," and that the same was illegal and void in this, that the constitution of the state required for its passage a concurrence of two-thirds of each branch of the general assembly, and that the yeas and nays on the passage thereof should be entered in the journals of each house. It is alleged that this act did not pass by a two-thirds vote; neither were the yeas and nays on its passage recorded. They allege the same is also true of the act of February 28th, 1876, and of the resolution of the legislature of the last session referring to these convicts, and insist no rights could be acquired by defendants under any of these acts, but they are null and void. This is the main question made by the amended bill, and the refusal of the court below to grant an injunction on this ground is brought here for review.

The second paragraph, sixth section of the constitution of 1868 is in the following words: "No vote, resolution or order shall pass granting a donation or gratuity in favor of any person except by the concurrence of two-thirds of each branch of the general assembly, nor by any vote to a sectarian corporation or association."

Is transferring to the Marietta and North Georgia Railroad Company the two hundred and fifty convicts for three years from the first day of April, 1879, without charge, upon such terms and conditions as are contained in the act of 1876, such a "*donation*" or "*gratuity*" as would require the same to be passed by a concurrent vote of two-thirds of each branch of the general assembly? In construing any portion of the constitution, courts give to

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Georgia Penitentiary Co. No. 2, *et al. vs. Nelms, principal keeper, et al.*

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the words of that instrument involved in the construction their *legal definition*.

Donation is defined by Bouvier to be "the act by which the owner of a thing voluntarily transfers the *title* and possession of the same *without any consideration*." Bouvier's L. D. It certainly will not be insisted that the state at the date of this act had the *title* to these convicts. They were persons who by reason of their violation of the penal laws and their trial and conviction therefor, had forfeited, for a certain time, their liberty or right of locomotion, and who were under the law subject to confinement and labor for a specified term.

In the exercise of its sovereign rights for the purpose of preserving the peace of society and protecting the rights of both person and property, the penitentiary system of punishment was established. It is a *part* of that *police system* necessary, as our law makers thought, to preserve order, peace and the security of society. The several *terms* of these convicts fixed by the judgments of the courts under authority of law, simply subjects their *persons* to confinement, and to such labor as the authority may lawfully designate. The *sentence* of the courts under a *violated law* confers upon the state *this power, no more*. The power to restrain their liberty of locomotion, and to compel labor for the purposes, not only of health, but also to meet partially, or fully, the expenses of their confinement, etc. This confinement necessarily involved expenses for feeding, clothing, medical attention, guards, etc., and this had been in its past history a grievous burden upon the tax-payers of the state. Surely it was competent for the *sovereign* to relieve itself of this burden, by making an arrangement with any person to take charge of these convicts and confine them securely to labor in conformity with the judgments against them for a time not exceeding their terms of sentence. It was a transfer by the state to the lessee of the *control and labor* of these persons *in consideration* that they would feed, clothe, render medi-

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aid and safely keep them during a limited period. This agreement on the part of the state (*subject to all her rights as a sovereign*) is not a "donation," since it does not transfer "*the title*" of the article (merely the possession), nor is the transfer *without a consideration*. A consideration is valid in law "if *any* benefit accrues to him who makes the promise or any injury to him who receives the promise." Code, §2740. Bouvier defines it to be "a compensation which is paid or an inconvenience suffered by the party from whom it proceeds." Bouvier's L. D., §278. Blackstone defines it to be "the *reason* which moves the contracting party to enter into the contract." 2 Black. Com., 443.

Taught by the experience of the past, this court holds that the saving to the state of the burden of confining in proper prisons, or by guards, feeding, clothing, furnishing medical treatment to these convicts, was a valid and legal consideration, paid by the Marietta & North Georgia Railroad for these two hundred and fifty convicts, and relieves the transfer made to that company of the *control and labor* of the same by the state from being either a "donation" or "*gratuity*" within the meaning of the constitution. A gratuity is defined to be "a present, a recompense, a free gift." Bouv. L. D. A gratuitous contract, such as complainants allege this to be, is defined to be "one, the object of which is for the *benefit* of the person with whom it is made *without any profit received or promised* as a consideration for it, as example, *a gift*." Bouvier's L. D., 568; 1 Bouv. Inst., 709. Our judgment then is that the act of 1876 was not illegal and void by reason of not having received the concurring votes of two-thirds of each branch of the general assembly.

The question as to whether these convicts are employed by the defendants in conformity with the law of their transfer, or what number may have been received by the defendants at the filing of complainants bill, are questions of fact about which there is a conflict of evidence in the re-



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Jones vs. The State.

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cord, and can be best determined by a jury on the trial. For these reasons, we see no abuse of discretion on the part of the judge below in refusing this injunction, and his judgment is therefore affirmed.

Judgment affirmed.

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JONES vs. THE STATE OF GEORGIA.

1. Where counsel who had been representing the defendant in a murder case, announced when it was called for trial that he no longer represented the prisoner, and counsel then appointed by the court announced that they were not prepared for trial, that although they had appeared at the committing trial by request of the justice, they had dismissed the case from their minds, and the evidence being entirely circumstantial, they did not feel that they could do justice to the prisoner, a postponement to a later day should have been granted, although the former counsel consented to assist in the defense as far as his strength would permit, he being unwell.
2. Before confessions can go to the jury at all, the court must hear and adjudge whether they were freely and voluntarily made. If he so decides, then they go to the jury only *prima facie* as having been so made. Therefore, where they are ruled in, no harm can come to the defendant from the jury's having heard the preliminary examination by the court. *Aliter*, had they proved inadmissible.
3. It was a substantial compliance with the act of 1878-9, which provides that the jury may believe the prisoner's statement in preference to the testimony of witnesses, to charge that the jury might treat the statement as they did the testimony of any witness, believing it all, or part, or none, as they should see fit—that it should have such force as the jury thought right to give it.
4. A charge not warranted by the evidence should not be given.
  - (a.) What is or is not sufficient to establish a disputed fact is a question exclusively for the jury.
5. Where a charge, though apparently improper when abstracted from its context, when considered in connection therewith is legal and proper, it is not ground for a new trial.
6. Where a case depended on circumstantial evidence, there was no objection to counsel for the defendant using in argument "Phillips' Remarkable Cases of Circumstantial Evidence," nor in counsel for the state seeking to break the force and effect thereof by characterizing it as mere romance or fiction. The court, however, should not express

- an opinion on the subject, but should charge the jury what principles applicable to the case should influence and guide them in reaching a verdict.
- . The court should charge principles, not facts. It was therefore wrong to read to the jury from a volume of the supreme court reports of this state the statement that "juries are generally too reluctant to convict on circumstantial evidence."
- . In all cases of felony a charge in writing may be required at the instance of either party, and when so written out and read to the jury, it becomes an office paper, is to be filed with the clerk of the court, and shall be accessible to all persons interested in the same. If a written charge is not required, it is no ground of error that it was not written or filed.
- . We express no opinion on the newly discovered evidence or the weight of the evidence, as there is to be a new trial on other grounds.

Criminal law. Continuance. Practice in the Superior Court. Charge of Court. Before Judge SNEAD. Richmond Superior Court. April Term, 1880.

Reported in the decision.

F. W. CAPERS; M. P. CARROLL; WM. E. JACKSON, Jr.,  
or plaintiff in error.

SALEM DUTCHER, solicitor-general; H. D. D. TWIGGS,  
or the state.

CRAWFORD, Justice.

The plaintiff in error was charged with the crime of murder, in that on the fifteenth day of December, 1879, he killed one John G. Haralson; he was tried in May hereafter, found guilty by the jury, moved for a new trial, which the court refused, and he excepted.

I. The first error complained of was the refusal of the court to grant him a continuance, or to postpone the trial of the case to some later day during the same term.

Messrs. William E. Jackson and F. W. Capers, who had

been appointed by the court to represent the prisoner, in support of their motion showed that Davenport Jackson, Esq., who had been prisoner's counsel, announced when the case was *called for trial*, that he no longer represented the defendant, of which fact he was ignorant until Mr. Jackson withdrew; that as counsel appointed by the court they were unwilling to proceed with the trial, the testimony being entirely circumstantial; and although they had appeared by request of the justice of peace as counsel on the preliminary examination, that they had dismissed the consideration of the case from their minds, and were totally unprepared to try it; being appointed as they were, after the calling of the case, they felt themselves unable to do justice to the prisoner.

We must confess that this appears to us to be such a showing as entitled the newly appointed counsel to a later day in the term, to look into, and prepare more thoroughly their defense for one who was to be placed upon trial for his life, notwithstanding the fact that Mr. Davenport Jackson consented to assist them as far as his strength would permit. Such a responsibility, so suddenly cast upon a conscientious attorney, might well force him to ask indulgence for preparation, or that he might be spared the fearful risk of the conviction of his client on account of his inability to command, under the emergency upon him, such grounds of defense as the accused really had.

We could not undertake to say what length of time should have been allowed, but certainly a sufficient time for the counsel to consider and consult as to what might be done to defend a man in such extremity, and if no deliverance were possible for him, then with that fidelity so honorably manifested by the profession, to have seen to it that he was condemned only according to law.

2. That the court did not retire the jury pending the examination of the witness King touching certain statements said to have been made to him by the prisoner.

The questions put to the witness in the presence of

the jury were: Did the defendant make any statement in reference to the crime alleged against him? and, were these statements freely and voluntarily made? We do not think that these questions fall within the ruling of *Hall vs. The State*, decided at the February term, 1880. An examination of that case will show that this court, after an elaborate statement of what transpired in the presence of the jury, held "that when such preliminary examinations as this are to be had, that the better practice is, and impartial justice demands, that the jury should be retired from the box whilst the admissibility of the evidence is considered by the court. When he has ruled upon it, let the jurors be brought in and the cause proceed, with such further rights as the law gives the prisoner upon his confessions."

Before confessions can go to the jury at all, the court must hear and adjudge whether they were freely and voluntarily made; if he so decide, then they go *prima facie* only to the jury, as having been so made. Therefore, where they are *ruled in*, as in this case, no harm comes to the defendant; but where they are heard by the jury and *ruled out*, the difficulty of their dislodgment is too great to be incurred.

But in this case there was no such examination as is set out in *Hall vs. The State*, nor after being had was there any testimony ruled out.

3. Because the court charged the jury as follows: "The jury may treat the defendant's statement as they do the testimony of any witness; that is, they may believe it all, or they may disbelieve it all; they may believe one part and disbelieve another, as they in their judgment may see fit. The law is that the statement is to have such force only as the jury may think right to give it." The error complained of in this charge is that it did not correspond more nearly with the act of 1878-9 in reference to the credibility which might be given to such statements. The act alluded to gives the jury the right to be-

lieve it in preference to the testimony of the witnesses. The judge said to the jury that they might treat it as they did the testimony of any witness—that they might believe it all, or part or none, which, in our judgment, was quite sufficient.

4. Because the court erred in charging the jury that the confession of the defendant that he was at the store of J. G. Haralson, deceased, at 10 o'clock on the night of the homicide, is sufficient to establish the fact that he was there at that hour.

There are two legal objections to this charge: The first is, that whilst the testimony, all taken together, may be sufficient to warrant *the jury* in reaching the conclusion that the prisoner was there that night, at that hour, it is hardly sufficient to authorize the charge in the language used. The second is, that what is, or is not sufficient to establish a disputed fact, is a question which, under the law, must be left exclusively to the jury.

5. Because of the following charge:

"In defining what is sufficient evidence, the law uses these words: Sufficient evidence is that which is satisfactory for the purpose. When the purpose is to ascertain whether a defendant is guilty of a crime charged against him, sufficient evidence is that which satisfies the jury of the defendant's guilt. If the evidence satisfies the jury, it is sufficient under the law, and if it does not satisfy them, it is not sufficient under the law."

The objection urged to this charge is, that it should have added the words "beyond a reasonable doubt." Taking it, however, in its proper connection, it is not error, as it appears to have been given in defining competent, sufficient, direct or circumstantial evidence; and besides, the jury was charged as to reasonable doubts in other parts of the instructions given by the court.

6. "That the jury must not be influenced, guided by, or accept as law in this case any imaginary cases taken from works of romance."

This charge became important in view of the fact that the state's counsel ridiculed "Phillips' Remarkable Cases of Circumstantial Evidence" as mere romance or fiction, the prisoner's counsel having read and commented on certain extraordinary cases therein to be found.

We see no objection to the use by counsel, in their arguments before the juries, of this work, nor on the other hand do we see any reason why, in reply, the opposing counsel might not break the force and effect thereof by characterizing it as was done in this case. If when the judge comes to instruct the jury on the law, he should have reason to believe that they were likely from any cause to be misled in reference thereto, it would be his duty to state to them what principles, applicable to the case, were to influence and guide them in reaching a verdict.

7. Because the court erred in pronouncing a eulogy upon Judge McDONALD, and in direct connection therewith, read from his opinion delivered in the case of *Newman vs. The State*, 26 Ga., 637, wherein he says, "Juries are generally too reluctant to convict on circumstantial evidence," and then read the law laid down by him in the remainder of the paragraph, but to which no objection is made. Upon this exception, we think the same is well taken, because the judge should give principles only and not facts in charge to the jury. What is here stated was never intended as anything more than a fact, and as such was not proper to have been given to the jury in a charge, as it was calculated to affect their minds adversely to the interests of the prisoner. Whilst we would not hold it sufficient to authorize the grant of a new trial, we think that it should have been eliminated from the principle charged.

8. Because the court erred in not filing his charge with the other papers as part of the record in the case, after he had reduced the same to writing, though not at the request of counsel on either side.

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Newman *vs.* Reagan.

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A charge in writing may be required at the instance of either party, and when so written out and read to the jury, it becomes an office paper, is to be filed with the clerk of the court, and shall be accessible to all persons interested in the same. The counsel not having brought himself within the statutory right granted him, cannot claim more in reference to this paper than the judge is willing to concede. The failure to file or to furnish the charge was a question resting solely with him, and therefore he committed no legal error as alleged in this ground of the motion for a new trial.

As this case is to be remanded for a new trial, we express no opinion as to the matter of the newly discovered evidence, nor as to whether the verdict is contrary to evidence.

Judgment reversed.

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NEWMAN *vs.* REAGAN.

1. The evidence being conflicting, this court will not control the discretion of the court below in refusing a new trial.
2. Where an employé fails to obey orders, to comply with his contract, was incompetent for the position he had assumed, or his conduct was such that he was injuring the business of his employer by selling at a loss, or by driving off the customers, in case of his discharge, he cannot recover for the time he did not serve, and whatever damage his employer has sustained, he can recoup against what wages may be due the employé.
3. Such conduct would authorize the discharge of the employé. The jury must determine whether his discharge was really caused thereby, or whether it resulted from the dullness of business. A slight mistake, working no injury, that would ordinarily be made, would not be a breach of the contract.

New trial. Contracts. Master and servant. Before Judge WRIGHT. Dougherty Superior Court. August Term, 1880.

Reported in the opinion.

H. MORGAN; L. ARNHEIM, for plaintiff in error.

D. H. POPE, for defendant.

HAWKINS, Justice.

This case comes before the court upon a transcript of the record from the county of Dougherty. The defendant in error brought his action in the superior court to recover from the defendant the sum of four hundred and twenty-five dollars upon a contract for services as clerk for one year, commencing the fifteenth day of August, 1877, to the fifteenth day of August, 1878. The defendant was discharged before the expiration of the time, and after August, 1878, brought suit to recover the full amount under his contract. To this action the defendant, Newman, pleaded the general issue, his right under the law to discharge the plaintiff, and that by his neglect and omissions he had been damaged an amount exceeding the sum sued for, and a set-off.

Upon the trial, and after both sides had submitted a great deal of evidence, and the judge's charge, the jury returned a verdict for \$261.99. At the April term of Dougherty superior court the defendant, Newman, made motion for a new trial upon thirteen grounds, but they may all be considered under three, which were relied on here.

1. That the verdict was contrary to law and evidence.
2. Contrary to the charge of the court.
3. That the court erred in its charge :

1. As to the first, we think the evidence in the case would have justified a verdict for either the plaintiff or defendant, and for that reason a verdict will not be disturbed by this court on that ground. This court has so often held that it is the province of the jury to decide upon the credibility and weight of evidence, and also that this court will not disturb the verdict of a jury when



there is sufficient evidence to support it, that it ought to be regarded by the profession as a settled question.

2. The second assignment of error was, that the jury found contrary to the charge of the court, in that the court charged that if the real cause of his discharge was because he failed to obey orders, and failed to comply with his contract, and was incapable for the position he had assumed, or his conduct was such that he was injuring the business, either by selling at a loss or driving off the customers, and the plaintiff so shows, then he could not recover for the time he did not serve. Whatever damage the defendant, Newman, has sustained by his neglect and failure to perform his contract, he can recoup against whatever wages may be due him. This to us appears to be unobjectionable law in view of the evidence in the record.

The third is, that the court erred in charging the jury as follows: "It is the duty of the employ   to execute the lawful orders of his employer within the scope of the business for which he has been employed, and if he wilfully violate or habitually neglect to obey them, it is a good and lawful cause for his discharge. If the cause was that Newman did not need him through the summer months, and wanted to get rid of him, and the pretext was that he had failed to do his duty, then the discharge would not release Newman from liability. Was he discharged on account of his failure to discharge his duty? or was that a pretext to discharge him on account of the dullness of the business season? A slight mistake, working no injury, that is natural for one to make, would not be a breach of the contract; it must be reasonable, and of this you are to judge from the evidence; you are to look at the whole evidence and determine." The whole charge taken together presented the legal questions fairly to the jury, and considering the evidence and the charge of the court, we think the verdict was authorized, and we affirm the decision of the court below in refusing a new trial.

Judgment affirmed.

## JAMES vs. KISER &amp; COMPANY.

1. Upon the call of a claim case in which the levy showed the defendant in *fi. fa.* to have been in possession, if the claimant failed to assume the burden of proof and proceed, and the court directed the plaintiff to assume the affirmative, the latter was entitled to open and conclude.
2. The court need not repeat a charge already given, on request.
3. The evidence required the verdict.

Practice in the Superior Court. Charge of Court.  
New trial. Before Judge CRISP. Early Superior Court.  
October Adjourned Term, 1879.

Reported in the decision.

E. C. BOWER, for plaintiff in error.

R. H. POWELL, for defendants.

JACKSON, Chief Justice.

This was a levy at the instance of M. C. & J. F. Kiser on a tract of land as the property of James & Brother, which land was claimed by the surviving partner of that firm as a homestead set apart to him as such survivor by the district court of the United States for the southern district of Georgia. The land was found subject, and, a new trial being denied the claimant, he brought the case here.

1. But two points were made before us and argued by counsel for plaintiff in error: First, that the court erred in not giving him the conclusion, as the levy showed that defendants in *fi. fa.* were in possession at its date; but the claimant, it appears from the record, did not take the burden of proof when required to do so, and the court then directed the plaintiff to proceed, and the burden was cast on him by the laches of the claimant.

On this state of facts, there was no error in giving the

plaintiff the right to conclude. It was too late for the claimant to demand that right, when he had failed to assume the burden of proof. Whether really at fault or not, in not going on with his proof when required to do so, we cannot consider, as the facts do not appear of record. By the record it only appears that he did not proceed when directed by the court, and thereupon the plaintiff was directed to assume the affirmative and take the *onus* of making out his case, which he did, and thereby was entitled to open and conclude the argument.

2. The second ground insisted on is that the court declined to tell the jury the form of verdict if they should find for the claimant, at the oral request of counsel at the time the judge gave them the form if they found for the plaintiffs. It appears from the record that the court had already given that form to the jury, and it was not its duty to repeat it.

3. Besides, the verdict is right; the evidence required it; and even if there had been such irregularities as the two errors assigned and argued here would amount to, the new trial would have been properly refused.

Judgment affirmed.

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ADAMS vs. THE STATE OF GEORGIA.

A demand for trial, with the right to a discharge under it, involves the impanelling of two traverse juries qualified to try the defendant, one when it is made, the other at the next succeeding term. It is sufficient that a jury has been impaneled at the second term; and it makes no difference that they have been discharged after inquiry by the court if any member of the bar knows of any further use for them, without response from the prisoner's counsel.

Criminal law. Practice in the Superior Court. Before Judge HILLYER. Newton Superior Court. March Term, 1880.

Reported in the decision.

L. L. MIDDLEBROOKS, for plaintiff in error.

F. D. DISMUKE, solicitor-general, by J. S. BOYNTON,  
for the state.

CRAWFORD, Justice. .

The defendant in the court below was indicted for bastardy at the March term of Newton superior court, and at the September term next thereafter, he by his counsel asked leave to place "a demand" for trial on the minutes, which was granted. At the March term, 1880, a discharge was moved, by an order reciting the fact that a demand for trial had been placed on the minutes at the preceding term, at which, as well as at that, there were juries regularly impaneled and qualified to try the said cause.

The court refused to pass the order and discharge the prisoner, because the "demand" did not show, nor was it made otherwise to appear to the court, that juries were present when the same was allowed; and further, because none were present when the order for discharge was moved.

1. A demand for trial, with the right of discharge under it, involves the impaneling of two traverse juries qualified to try the defendant, one when it is made, the other at the next succeeding term.

If these material facts concur, and they are made to appear to the court legally, the discharge is not optional but imperative. That they have been *impaneled* at the second term is sufficient, although they may have been discharged before the order of acquittal is moved. Nor is this right impaired by failure of prisoner's counsel to respond when the court asks, if any member of the bar knows of a further use for the juries; *representing* as he does the prisoner, he certainly has no use for a jury, and

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Anderson vs. Anderson.

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*knowing* as well as he does, that there is no acquittal so easy as one thus obtained, he may well preserve his silence, await their final discharge, and then by law ask that of his client.

Judgment affirmed.

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ANDERSON vs. ANDERSON.

[JACKSON, Chief Justice, was providentially prevented from presiding in this case.]

Where to a suit brought in Georgia on a judgment rendered in the state of Tennessee. the defendant pleaded his discharge in bankruptcy, and it appeared that he was adjudged a voluntary bankrupt pending the suit in Tennessee, but failed to plead that fact, or to ask a stay of the proceedings on that account, and the judgment was subsequently rendered, and he thereafter obtained his discharge:

*Held*, that the plea was a valid bar to a recovery. The Tennessee judgment did not constitute a new debt, but simply a new security for the old debt, and of itself had no force or effect in Georgia.

Bankrupt. Judgment. Before Judge McCUTCHEN.  
Catoosa Superior Court. February Term, 1880.

Reported in the opinion.

R. J. MCCAMY, for plaintiff in error.

W. H. PAYNE ; J. H. ANDERSON ; I. E. SHUMATE, for defendant.

HAWKINS, Justice.

On the twelfth day of April, 1875, James H. Anderson, in a chancery court in the state of Tennessee, obtained a judgment against the plaintiff in error, J. M. Anderson, for five hundred and twenty-one dollars, besides interest and costs.

On the seventh day of April, 1879, he brought his action of debt on this foreign judgment against the plaintiff in error, in Catoosa superior court. To which the defendant pleaded his discharge in bankruptcy, and on an agreed statement of facts the judge, without a jury, awarded a judgment for the plaintiff.

By the agreed facts, it appears that J. M. Anderson, on the twenty-third day of March, 1875, was indebted to J. H. Anderson in the sum of \$521.00, that on that day suit was then pending in the chancery court of the state of Tennessee, the residence of said J. M. On that same day J. M. was adjudicated a voluntary bankrupt on his own petition, with due notice to all his creditors as the law required. During the pendency of the bankruptcy proceedings, to-wit: on the twelfth day of April, 1875, judgment was rendered against the said bankrupt for the full amount, no plea being filed, and no suggestion of bankruptcy, and no effort to stay proceedings.

On the eleventh day of December thereafter, the said J. M. was duly discharged as a bankrupt from his debts, which existed on the twenty-third day of March, 1875.

This debt is such a debt as would have been affected by the discharge, unless the judgment rendered as aforesaid prevented it. Neither the judgment nor the debt were proved in bankruptcy.

The question therefore for adjudication is not so much what effect the discharge has upon the judgment in the state of Tennessee, whether the same is still unaffected by the discharge, or remains intact and operative in every respect and enforceable at law in the same way and to the same extent as if no bankruptcy had supervened, but whether to a suit upon a foreign judgment obtained upon a debt since 1868, the plea of the bankrupt's discharge granted before the suit is a good defense.

The solution of that must rest upon several propositions. If it is a provable debt against the bankrupt's estate, can the lien of a judgment be preserved from

sale and the debt still become extinct? What effect has the failure of the bankrupt to suggest bankruptcy when suit on a provable debt is pending, or the judgment obtained after his adjudication, and what distinction is there between the right obtained by the judgment in the state of Tennessee and the one sought by the pending action of debt in Catoosa county?

Let us examine these legal elements in the light of the bankrupt law, the decisions of the courts and reason.

Every debt of whatsoever kind made by the bankrupt before the date of his adjudication, except those created by fraud in some fiduciary character, or having a legal lien allowed by the law of the *situs*, is provable in the bankrupt court, and when a discharge is granted the bankrupt is relieved from all such provable debts, and by the amendatory bankrupt act of 1873, his discharge extends to all liens, judgments, etc., as well as other liabilities, but it is not necessary here to consider that amendatory legislation to the system of bankruptcy. Whatever our respective opinions may be upon that subject, and its effect upon existing contracts, liens, etc., before and after 1868, we adhere to the decisions of this court touching those questions until the supreme court of the United States shall by decision settle what is now so in conflict, nor is it germane to the case at bar.

If therefore this be one of the class not by fraud, or in a fiduciary nature and having no lien, then it must be that the discharge of the bankrupt is a good plea to its enforcement.

The object of the plaintiff is not to enforce the lien of his judgment obtained in a Tennessee court, for that can have no extra-territorial legal merit. It operates upon and binds nothing, and is a lien upon nothing. It can no more be enforced in Georgia than the original debt upon which it was founded.

In our law it is called a debt of record, suable as any other debt, promissory note, bill of exchange, covenant

or contract, and by a similar action, the only difference being that the judgment is an estoppel as to all matters pleadable before judgment, and before the lien is created. In other words, the judgment binds the defendant just like a judgment would bind in the cases upon other contracts when obtained, but in neither case is the lien created until judgment and all are subject to the defenses of payment, release and discharge, and the like.

So this debt, whether an old or a new one, whether the contract, being merged in the judgment and constituting a new debt of record, or remaining as an old debt with a new form and security, cannot change its legal status, as a debt stripped of its lien as a judgment, whether the judgment in Tennessee was a new debt or a new security for the old one, either or both would be but a debt here without a lien, and the plea would be good, unless the failure of the bankrupt after his adjudication to plead or apply for a stay of proceedings, would bar him of the right. The proceedings in bankruptcy were pending when the judgment was obtained, when the bankrupt was *civiliter mortuus*, and when the bankrupt law forbade all proceedings in the state court.

In those cases where it was held that the bankrupt was concluded by a judgment obtained after adjudication, the courts put their ruling upon the ground that it was a new debt, and, being a debt after adjudication, was binding on the defendant in any form, whether by contract or judgment; by a reference to the brief at the end of this opinion, it will be seen that the better rule is that the judgment is not a new debt, but the old debt is only merged in the judgment, and thereby obtains another security, the one provided by law.

So are all of our decisions in reference to the homestead exemptions. In every case this court holding that the date of the contract and not the judgment determined the question of exemption. So there is nothing in the two cases relied on here and decided by this court, of



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Anderson vs. Anderson.

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*Steadman vs. Lee* and *Freeman vs. Roberts*, contrary to this doctrine. In those cases, one an illegality the other a claim, the questions were as to enforcing liens; besides, the judgments were obtained after the discharge of the bankrupt.

After discharge he was *sui juris* to all intents and purposes, and was as much bound on a judgment by default even upon a debt before his adjudication as any other person failing to make defense, and his failure to plead was similar to the default of any other person who had been sued. If the case had been on *scire facias* to revive a dormant judgment under our law, the defendant could set up payment, discharge or release after judgment.

So we think the true rule is, that the judgment on a contract is not a new debt, in the sense of contract debts, but is the old debt maintained with a new security—the old debt is merged, so to speak, in the judgment. As to all defenses then existing it is conclusive; but as to a bankrupt discharge, in no sense is it a new debt.

The defendant, by his plea of discharge, does not seek to interfere with the plaintiff's judgment in the state of Tennessee, but he says, I am no longer *personally* liable for the *debt*, and the fact that no plea was filed and no application to stay the proceedings in the Tennessee court, cannot affect my right to plead a discharge from the obligation of the debt without interfering with the lien of the judgment. The two are distinct, and in no way can the one affect the other, except to be pleaded as a discharge. Whatever may be done by this action in Georgia will not interfere with the judgment in the state of Tennessee; and if so, it is quite unnecessary here to decide to what extent, for the whole scheme of the bankrupt law discharges the bankrupt from the debt and preserves the lien, as this court has held in several cases; the debt gone, but the lien remains.

If the defendant in error was seeking to enforce a judgment lien obtained in this state pending the bankruptcy

*Crawford vs. Jones.*

proceedings, after discharge, the bankrupt might not be allowed to say aught against the lien, but certainly the debt would be discharged, and when he had exhausted his lien remedies, and by an action of debt sought a personal liability of the bankrupt, then the discharge would avail. So we think the court erred in its judgment.

See 27 Maine R., 441; 6 Hill, 254; §20, Bankrupt Law; 20 Vermont, 293; 26 *Ib.*, 397; 30 Miss., 389; 1 La. An., 161; 1 Sanford, 659; 7 Howard, 612; Bump on Bankruptcy, 736-7-8; 3 Barb., 429; 9 *Ib.*, 496; 3 Barb. Ch., 360; 2 Tenn. Ch., 633; 50 N. Y., 593; 5 Heiskell, 54.

Judgment reversed.

CRAWFORD vs. JONES.

1. *There was* no error in the charge which would require a new trial and the jury having passed upon the conflicting testimony, this court will not interfere with their finding.
2. *Where* a defendant in bail-trover brings the case to this court, he is not compelled to make the security on his bail bond a party to the bill of exceptions.

New trial. Practice in the Supreme Court. Before Judge COBB. City Court of Clarke County. April Term, 1880.

Reported in the decision.

JACKSON & THOMAS, for plaintiff in error.

POPE BARROW; BROYLES & JONES, for defendant.

JACKSON, Chief Justice.

This suit was brought by Jones against Crawford for the recovery of a horse or damages therefor. Jones alleged

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Crawford vs. Jones.

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that the title to the horse did not pass out of him into Crawford, and Crawford alleged that it did pass. There was an exchange of possession of horses, Jones being possessed of Crawford's and Crawford of Jones', and the change of possession was for trial of the horses, as Jones contended, to see whether they would trade. Both horses died before the trial of the case.

1. Taking the charge of the court altogether, we think that it presented the law of the case fairly and fully to the jury; the facts were passed upon by them; they gave forty dollars damages to the plaintiff, which was a sort of compromise verdict between the litigants, and there is evidence enough to support it.

There are many grounds taken for a new trial in the motion, predicated on the charge as erroneous in several particulars; but we see no material error in it, none sufficiently grave to require that the verdict be set aside and a new trial granted.

No material error of law being made to appear to us from the record, and the testimony being conflicting but furnishing evidence sufficient to sustain the verdict, and the presiding judge being satisfied with it under our repeated rulings, we do not interfere.

There was damage claimed by each party against the other in respect to his horse, but the jury passed upon it, and their finding must stand.

2. A motion was made to dismiss this case, on the ground that the security on the bail-bond was not made a party to the bill of exceptions; but it was the defendant who brought the case here, and in such case his security need not be joined in the bill of exceptions.

Judgment affirmed.

## YOUNG vs. THE STATE OF GEORGIA.

1. The verdict in this case was not contrary to law or the evidence.
2. It was not admissible to ask a prosecutrix if she did not make certain statements in reference to the case on trial to an attorney different from those testified to by her, it appearing that such statements were made, if at all, in contemplation of the employment of the attorney to prosecute the case, although he was not actually employed until afterwards. If, however, in the examination in chief the witness should testify to anything occurring in such communications material to her side of the case, the other party would have the right to inquire concerning the entire conversation. If there should be anything tending to criminate her and she should refuse to answer as to it, the whole conversation should be excluded.
3. If counsel in argument travel outside of the case, the attention of the court should be called to it, and his ruling invoked either to restrain counsel or by way of a request to charge. It is too late to raise the point on a motion for new trial.

New trial. Criminal law. Attorney and client. Witness. Evidence. Practice in the Superior Court. Before Judge LESTER. Cobb Superior Court. November Term, 1879.

The following, taken in connection with the decision, sufficiently reports this case :

Young, a colored man, was indicted for the rape of one Mary Bell, who appears to have been a white prostitute. On the trial, he was found guilty. He moved for a new trial on the grounds stated in the decision, which was refused, and he excepted. In connection with the second ground of error alleged, it may be stated that the prosecutrix testified that just after the offense was committed, she went to A. S. Clay, Esq., for the purpose of employing him, and conversed with him about the case. She did not actually employ him until some months afterwards, and during the intervening time he made an affidavit which was used on the trial of a *habeas*

*corpus* case to fix bail for defendant, stating what she had said to him concerning the perpetrator of the crime. The point contained in the third ground was first raised on the motion for new trial.

GOBER & LESTER; W. R. POWER, for plaintiff in error.

THOS. F. GREER, solicitor-general, for the state.

CRAWFORD, Justice.

The plaintiff in error was charged with rape, found guilty, moved for a new trial which was refused, and he excepted. The grounds upon which his counsel relied before this court were:

1. That the verdict was contrary to law, and contrary to evidence.

2. Because the court erred in not allowing counsel for defendant to ask Mary Bell, if she did not tell A. S. Clay, Esq., on the fourteenth day of May, 1879, that the man who committed the rape upon her was a tall, large negro, with high cheek bones.

3. Because the solicitor-general was allowed in his concluding argument to say to the jury that the defendant was a negro, and the prosecutrix a white woman, and that they ought to put a stop to miscegenation as there was no telling where it would stop if it were not cut off, the jury being all white men.

1. The testimony of Mary Bell, the alleged victim of this crime, was positive both as to the identity of the person, and the commission of the act. It is true that it was shown that she was a lewd woman of the most abandoned character, and that from that character she was not to be believed upon her oath. She was however corroborated in much of her testimony by other witnesses who were not impeached.

Rebecca Burton testified as to the identity of the accused, and also as to his guilt. James Burton testified to

the presence of defendant in Mary Bell's room, and that he saw him jerk her down upon the bed after he had failed to find Leana Burton, another of these unfortunate girls, for whom it appears he had been vainly in search. No effort was made to impeach this lad, and no witness was brought to prove that Rebecca Burton was unworthy of belief, the only attempt to discredit her being upon a matter not touching the *corpus delicti*, and in which it does not appear that the defendant succeeded.

To sum up on this point, it appears that the jury, who must be the judges of the fact, when the case is properly sent down to them, as to whether *a rape* has been committed or not, believed that it had, and the judge, upon a review of the evidence and the verdict, declined to interfere with their finding.

2. Was the court right in excluding a statement said to have been made by the prosecutrix to A. S. Clay, Esq., who was of counsel for her at the trial, but who was not at the time when the same was made?

The law recognizes and protects the confidential relations existing between attorney and client, and we would not abridge in the remotest manner these relations. In this case the record shows that although the attorney was not actually employed at the time of the conversation, yet that the same was had *in anticipation of employing him* and we think it comes fully within the letter, the reason and spirit of the law. Whilst we thus hold, it is proper further to declare, that if the witness in his testimony shall disclose anything in such confidential communications material to his side of the cause, then the other party would have the right to all that was said in the same conversation, although it was said to the attorney, and may injuriously affect his case. If the additional testimony should be such as to criminate the witness, and he declines to answer it, then the whole conversation should be excluded from the consideration of the jury.

In this examination no part of the testimony sought

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*The Bank of the University vs. Bell.*

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had been given or brought out by the state, and therefore it does not fall within the rule here laid down. The court committed no error in rejecting the statement.

3. It is undoubtedly the duty of the judge, as far as possible, to restrain counsel whenever they travel out of the law and testimony involved in the case, and to confine them to the issues made by the proof and the pleadings. But when the judge is preparing his instructions for the jury in writing, or contemplating the principles of law to be given, his mind cannot be directed to every utterance made by counsel in the argument, and if the opposing counsel fear to interrupt, lest the retort may injure his client, he can always, by a written request to charge, correct errors of law or absurdity of position when the retort would be impossible.

For counsel to sit silently by, saying nothing, asking no correction in the charge, and never bringing his complaint to the attention of the judge, until it appears among the grounds for a new trial, would be to lie in ambush both for him and the opposite party, and this the law does not encourage.

Judgment affirmed.

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THE BANK OF THE UNIVERSITY *vs.* BELL.

Where a note payable to husband and wife was placed in bank for collection, the bank having notice that it was given for property of the wife, and when collected the amount was paid, by direction of the husband, to a partnership debt of the latter, the bank thereby became liable to the wife. The fact that it was a partnership debt to which the money was appropriated does not change the rule, for that is a debt of the husband.

Husband and wife. Contracts. Before Judge COBB.  
City Court of Clarke County. April Term, 1880.

Reported in the decision.

GEORGE D. THOMAS, for plaintiff in error.

T. W. RUCKER, by J. T. GLENN, for defendant.

HAWKINS, Justice.

The defendant in error, E. C. Bell, brought an action of assumpsit in the city court of Clarke county, to recover of the plaintiff in error one thousand dollars, besides interest, which she alleged was due her on the following statement of facts. By consent of counsel for both parties to the case, it was tried before Hon. Howell Cobb, judge of said court, without the intervention of a jury. The defendant, now the plaintiff in error, filed a plea of the general issue, and the case went to trial before the judge as aforesaid, on the following agreed statement of facts, to-wit:

1. The plaintiff, E. C. Bell, inherited from her grandfather, A. H., in the state of North Carolina, a tract of land which was her separate and individual property. She sold the same to S. H. for one thousand dollars, taking his note therefor payable to A. A. Bell and wife, or bearer (A. A. Bell being husband of plaintiff).

2. A. A. Bell brought said note to the Bank of the University, plaintiff in error, and gave it to said bank for collection, the maker being a resident of North Carolina. The said bank did, through their correspondents, collect the said note at maturity. The officers of said bank knew that said note was given for land which belonged to E. C. Bell, the plaintiff.

3. When said amount was so collected, A. A. Bell ordered the bank aforesaid to place the same to the credit of Summey, Hutcheson & Bell, on their note payable to Mrs. S. A. Turner, who had also left said last mentioned note with said bank for collection. A. A. Bell was a member of said firm of Summey, Hutcheson & Bell. Mrs. Turner then ordered this sum of money placed to



her credit on a note which she owed the said Bank of the University, which was done.

4. Mrs. Turner, and P. W. Hutcheson, of the firm of Summey, Hutcheson & Bell, were solvent at the time of these transactions, and are still so. The Bank of the University had no knowledge of any transaction between Mrs. Bell and her husband, or with Summey, Hutcheson & Bell, if any occurred- Nor did said bank ever have any dealings with Mrs. Bell or know her in the transactions in any way other than is above set forth.

After argument the court gave judgment for the plaintiff, E. C. Bell, against the defendant, the Bank of the University, for said sum of one thousand dollars with interest.

The plaintiff in error, the Bank of the University, assigns the same as error. The only question involved in the case is whether the defendant is liable. It was insisted here by the counsel for the plaintiff in error that the bank was not liable at all, and if liable, was only liable for one-half of the amount sued for, for the reason that the debt of the husband was a partnership debt, the other partners being solvent. When the Bank of the University collected the money on the note, they knew that the same was the property of Mrs. Bell, and having by the order of the husband placed the same to the credit of the firm of which Bell, the husband, was a member, the liability then attached. The note belonging to Mrs. Bell was her property, and when collected the money was hers and subject to her draft or order, and knowing the fact that the note and money were hers, the payment of the money to the debt of the husband rendered the bank liable, and it can make no difference whether it was paid to the individual or partnership debt of the husband. The law makes no distinction whether it is a trust, personal or partnership debt; it declares that the payment of her money to the debt of the husband is illegal, and this court has settled the right of the wife to recover from any and

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Deas, administrator, vs. McRea, administrator *de bonis non*, et al.

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all persons who so deal with her money with notice. The policy of our law is to protect the property and money of married women from the debts of the husband. If the question was *res integra* we might modify the strictness of the rule, but the uniform decisions of this court are in accordance with this ruling, and we adopt the maxim *stare decisis*.

Let the judgment of the court be affirmed.

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DEAS, administrator, vs. MCREA, administrator *de bonis non*, et al.

A bill alleged as follows: Complainant furnished plantation and family supplies, money, etc., to an executrix, which she liquidated by a promissory note signed by her as executrix, and suit was brought on it. She intermarried and her letters thereby abated; her husband administered *de bonis non*, and she died. A bill was filed by the legatees who were entitled to the estate, part of it at the testator's death and part of it at the death of the said executrix, and they and the administrator *de bonis non* made a settlement by which a decree was to be taken requiring all of the estate to be turned over to the legatees, they agreeing to pay the debts, and the estate, consisting mainly of a tract of land, will be disposed of accordingly without first paying the debts. Before the death of the testator, and in his last illness, he begged the complainant to assist his wife as executrix and to run such an account; and this had been one main inducement to extend credit. There was no provision in the will for such a charge on the land in dispute; provision was made for the payment of debts out of other property. It was not charged that the executrix or her estate was insolvent, nor was it shown that the advances went to permanently benefit the estate. The prayer was for injunction to prevent the consummation of the agreement between the legatees and the administrator *de bonis non*, and that the debt be paid out of the estate in hand.

*Held*, that there was no equity in the bill.

Equity. Administrators and executors. Before Judge CRISP. Lee Superior Court. March Adjourned Term, 1880.

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Deas, administrator, vs. McRea, administrator *de bonis non*, et al.

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To the report contained in the decision it is only necessary to add the following: The will of Leggin, under which McRae, administrator *de bonis non*, was acting, provided that certain property should be sold for the payment of debts, it gave certain specific bequests, and left a share of the residue to his wife for life with remainder over. It is property of this last class which the bill seeks to subject for the debt created by the wife, who was also executrix of the will.

W. H. BALDY; GUERRY & SON, for plaintiff in error.

G. W. WARWICK; E. G. SIMMONS; J. F. WATSON, for defendants.

JACKSON, Chief Justice.

The defendants demurred to complainant's bill, and the court dismissed the bill; the error assigned is the judgment dismissing the bill.

The substance of the bill is that complainant furnished goods, wares and merchandise, and some money, in an account which ran for several years, to Mrs. Leggin, executrix of her husband, which she liquidated by a promissory note signed by her as executrix—that he sued on the note at common law, but brought this bill returnable to the same term of the court in aid of that suit, because equity alone could give complete relief, the object being to make the estate of testator liable to pay the note—that Mrs. Leggin had intermarried, her letters testamentary had abated, and McRae, her last husband, had administered *de bonis non* on the estate—that she had died since, and a bill, then pending in the same court, had been filed by the legatees who were entitled to the whole estate, part at the death of testator, and part to-wit: Mrs. Leggin's, or Mrs. McRea's interest, at her death, in remainder, against McRea as said administrator *de bonis non*, for the whole estate—that a settlement had been made between complainants in the last named bill, and

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Deas, administrator, vs. McRea, administrator *de bonis non et. al.*

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McRea and entered of record, whereby a decree was to be taken to turn over the whole estate to the legatees on their paying some six hundred dollars to McRea's counsel—the complainants also agreeing to settle the debts of the estate—that thus the administrator *de bonis non* would dispose of all the estate, consisting mainly of a tract of some eleven hundred acres of land, without first paying this debt—that the testator, on his death-bed or in his last sickness, had begged Porter, the complainant in this bill, to assist his wife as executrix, and run such an account with her, and this had been one main inducement which led him to extend the credit to her which he regarded as, and averred to be, a charge on testator's estate—that there was this fraud and collusion between the said legatees and the administrator against complainant—that complainant therefore prayed for the writ of injunction, restraining the administrator, McRea, from consummating the agreement with the legatees, and turning over the whole estate to them, and restraining the legatees from receiving it, or further proceeding with their bill, and that the court decree that the balance due on the note given by Mrs. McRea, while Mrs. Leggin, be paid out of testator's property in the hands of McRea.

We are unable to see the equity of the bill. Mrs. McRea was personally liable on the promissory note. It is not alleged that she died insolvent. The account in liquidation of which this note was given, is appended to the complainant's bill. It consisted of plantation supplies and family expenses, and money loaned, all of which perished in the use, and none of which is shown by the bill to have permanently gone into the property of these legatees, so as to improve that part of the estate, the right of possession of which they acquired immediately on the testator's death, or that part which they acquired when the life tenant died. To bind in equity the *corpus* of their property to pay this debt under the facts averred in this bill, it must appear that their property was benefited by it, because there was no legal authority to run the farm, or

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Deas, administrator, vs. McRea, administrator *de bonis non*, et al.

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keep the property together. While it was testator's property, he could bind it; but he did not. The conversation between this creditor and the dying man did not so bind it. The debt became no legal charge on his estate. His will makes no provision for it out of this property to pay any debt, but it does provide for the payment of testator's debts out of other property. Nor does it authorize the keeping the estate together or running the plantation from year to year, nor was authority for such purpose granted by any court. No codicil was executed or nuncupative will made for such purpose, or to bind or charge this property with these expenses to be incurred by the executrix for such purpose. So that if all other difficulties were removed, there is no equity in the bill to charge the property of these legatees with this debt.

But there are other difficulties. The land is there. It cannot move. If it be charged with the payment of this debt or be liable for it, there it is. Moreover, by the agreement, any valid debt of this administrator is to be paid by these legatees by virtue of the very decree which they and the administrator have agreed upon. It would be strange for equity to enjoin a bill pending in the same chancery court to save a creditor whose debt, if valid at law or in equity, is provided for in the decree which that last bill will itself render—if indeed it would interfere with such a bill at all by a new one, but would rather require the person aggrieved to become a party to the bill then already pending in the very same court.

But it is enough to say that this complainant, if he has any valid lien, or charge, or right of any sort, legal or equitable, on the property of these legatees to pay this debt, is to be protected by the decree agreed upon; and that, by the allegations of the bill as it stands, always to be construed most strongly against the pleader, the complainant has not made out such a charge or right at law or in equity as will entitle him to relief in equity out of this property.

Judgment affirmed.

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Cherry, sheriff, *vs.* The Planters' Warehouse Co. *et al.*

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CHERRY, sheriff, *vs.* THE PLANTERS' WAREHOUSE COMPANY *et al.*

A sheriff brought suit against a warehouse company and J., alleging that he was proceeding to sell property of the company under a mortgage *fi. fa.*; that J. bid it off, and was in the act of paying over the money, when he was served with a temporary injunction, preventing the paying over of the money and the execution of the deed; that the injunction was subsequently made perpetual; that the decree was so made without any charge of default on his part but for alleged misconduct of said J. at the sale; and that he was thereby prevented from receiving his commissions, for which he brought this suit. By amendment, it was alleged that J. and others held the *fi. fa.* as assignees; that J. was one of the largest stockholders in the company, and had appeared at the sale and forbidden it, thereby causing the property to bring less than its value; that at the instance of certain interested parties, and by the consent of J., a decree was rendered setting aside the sale and enjoining its consummation.

*Held*, that a demurrer to the declaration was properly sustained.

Sheriff. Actions. Costs. Before Judge SIMMONS.  
Bibb Superior Court. April Term, 1880.

Reported in the head-note and decision.

W. DESSAU; R. K. HINES, for plaintiff in error.

WHITTLE & WHITTLE, for defendants.

CRAWFORD, Justice.

George F. Cherry, sheriff of Bibb county, brought suit against the defendants in error to recover \$241.00, as so much money due him on the sale of the Planters' Warehouse, under and by virtue of a mortgage *fi. fa.* in favor of Duncan, Sherman & Co. against the said Planters' Warehouse Company.

He alleged that he exposed the said property to sale

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Cherry, sheriff, *vs.* The Planters' Warehouse Co. *et al.*

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that it was knocked down to Hardin T. Johnson, who was in the act of paying him over the money therefor, when he was served with an order from the superior court enjoining him from executing to Johnson a deed, or receiving the money for the sale of the property; that afterwards the said injunction was made perpetual; that the decree in the said cause was so made without any charge of default against him, but was on account of the alleged misconduct of the said Johnson at the said sale, and by which he was prevented from receiving \$237.50, which was the amount of his commissions on the sale.

This declaration was amended by alleging that Johnson was one of those to whom the said *fi. fa.* had been assigned; that he was one of the largest stockholders in the said company; that he appeared at the sale and forbade the same because it was illegal and unauthorized, thereby preventing the property from bringing its value; that afterwards a bill was filed to set aside the said sale on account of the facts herein set forth; that the said Johnson was a party respondent to said bill; that a decree was rendered setting the said sale aside for irregularity, to which the said Johnson consented, thereby showing that his illegal conduct was the cause of the same, and hence he became liable to pay the plaintiff his fees due upon the said sale.

To this original and amended declaration the defendants demurred, which demurrer was sustained by the court, and the plaintiff excepted.

The plaintiff insists that he had a sufficient cause of action to entitle him to recover in this suit. His right to do so, he rests upon the ground that after crying the property, it was bid off for H. T. Johnson, but before the completion of the sale by a payment of the money and the execution of a deed, an injunction was served upon him prohibiting him from receiving the money or making a deed. The sale of this property was therefore arrested before the same was complete, by an injunction which put

its restraining power both upon the sheriff (this plaintiff), and the bidder (this defendant), making them, as we understand, respondents to the bill, and taking charge of the whole subject matter. It is further shown that upon the hearing of the bill the injunction was made perpetual. If therefore that decree did not effectually put an end to the attempt at a sale of this property, we are at a loss to see how it could have been more thoroughly complete.

But it is said that Johnson consented to that decree, thereby showing that his illegal conduct was the cause of the failure to perfect the sale, and hence his liability to pay the plaintiff his fees. It appears to us that the sheriff should have insisted upon his rights, if he had any, against Johnson, who was but a bidder at this attempted sale, at the hearing on the injunction and before the decree, for he certainly can have none under the facts set forth in this suit. The demurrer was properly sustained.

Judgment affirmed.

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GUNN vs. WADES.

1. The evidence was sufficient to sustain the verdict.
2. Where it was shown that a witness upon a former trial had since committed a homicide, had been advised to go off, had not been heard of in several years, and that his wife and sisters either did not know where he was, or would not communicate his whereabouts if they did, that he was inaccessible was reasonably established, and secondary evidence as to what his testimony was on the first trial was admissible.
3. Where there are several lessors in ejectment, deeds from the one to the other are admissible in evidence, whether void or voidable, to show privity between them, and to establish the right of the plaintiff to use their names.
  - (a). Under art. ix, sec. viii, par. 1 of the constitution of 1877, a deed conveying homestead which had been set apart under the constitution of 1868, and the acts passed thereunder, is not void.
  - (b). When the consideration of a deed conveying a homestead set apart under that constitution was to secure a debt which was superior to the homestead, the title passed.



- (c). Though a deed tendered in evidence by the plaintiff in ejectment conveyed no title, it should be admitted subject to have its legal effect construed by the court.
4. Where a recovery in ejectment is had upon a declaration containing several demises, the verdict will be upheld though but one of the demises be good.
  5. Where ejectment was brought in the year 1874 on the demises of the beneficiaries of a homestead and of the purchasers therefrom, and was pending at the date of the act of 1876, even though the conveyance of the homestead was void, the title remained in the beneficiaries and a recovery could be had on their demise.
  6. Where one of the heirs of an estate having one-third undivided interest in certain lands, executed a mortgage thereon in the year 1867, and foreclosure was had, a sale thereunder only conveyed such one-third undivided interest, and made the purchaser a tenant in common with the other heirs, though subsequently to the date of the mortgage, and before the sale, a division was had by agreement, and a specific portion of the land was set apart to the mortgagor, and a homestead laid off to him and his family therein.

Ejectment. Evidence. Homestead. Title. Deeds. Before Judge CRISP. Early Superior Court. December Term, 1879.

Reported in the opinion.

JNO. T. CLARKE & SON; A. HOOD, JR., for plaintiff in error.

R. H. POWELL; J. C. RUTHERFORD, for defendants.

HAWKINS, Justice.

In January, 1852, James Jones Taylor departed this life testate, leaving a large estate including nearly all the lands in controversy. At the time of his death he was in possession of the lands, and left a widow and three children, James, Robert and Hattie. By his will he bequeathed the lands to his three children; the lands were not sold but were possessed by the heirs-at-law and the

executor and administrator until the year 1871, when by mutual agreement a division took place, dividing it into three parcels, one to each of the children. In 1867, before the division took place, Robert executed a mortgage to Gunn of fifteen hundred and thirty-eight dollars and eighty-seven cents, upon one undivided third of all the lands bequeathed by his father, and some lands willed to him and his brother by his grandfather. After the division in 1871, Robert Taylor applied for and obtained a homestead in the lands set apart to him, and on the sixteenth day of March, 1872, he and his wife, with the approval of the ordinary, sold the lands thus assigned as a homestead to the Wades (the plaintiffs in ejectment) for the sum of, and to secure a debt of, eleven hundred dollars, eight hundred dollars of which was claimed as a debt due from the estate of his father, and three hundred dollars personal to himself. The Wades took possession of the land late in 1872 or in 1873, by putting a tenant by the name of Durnell in possession. Gunn transferred the mortgage to Robert Currier, of the state of New York, who, on the fourteenth day of October, 1871, filed a bill in equity in the circuit court of the United States against Robert to foreclose said mortgage, and on the twenty-seventh day of April, 1873, obtained a final decree foreclosing said mortgage on the one undivided third of the plantation, consisting of twenty-six hundred and twenty-five acres, more or less, and on the twenty-third of August, 1873, William H. Smythe, United States marshal, by his deputy United States marshal, levied upon the said undivided one-third interest, and on the seventh day of October thereafter, sold the same, and the said Gunn became the purchaser for the sum of two hundred dollars, and thereupon dispossessed the tenant of the Wades as to the lands sued for and which in the division went to Robert, and upon which he had taken a homestead, and with his wife and the approval of the ordinary had sold to the Wades. The Wades brought a

suit in ejectment upon the several demises of Robert and wife and themselves, and on the trial thereof the foregoing evidence was submitted, and after the charge of the court, the jury found a verdict for two-thirds of the premises, with *mesne* profits, amounting to sixteen hundred dollars.

A motion was made by Gunn for a new trial upon various grounds, which motion the court refused, and for said refusal this writ of error is sued out, the grounds of the motion for a new trial were :

- 1 and 2. The verdict is contrary to law and evidence.
3. Because upon defendant's objection to the introduction of the deed from Taylor and wife to the Wades, on the ground that the same was for homestead property which could not be so conveyed away, it was admitted.
4. Upon the same ground as to the deed from James Taylor.
5. Because the court erred in permitting Wade to testify to the evidence given in on a former trial by Durnell.
6. In refusing to exclude the testimony of Wade as to the nine hundred dollars.
7. Because the court erred in charging the jury "that if James J. Taylor, for over twenty years, held these lands as his own, and his executor has after him continued to do so, without any possession adverse to them, and the three heirs, by mutual consent, divided the lands, and one of the heirs, Robert B. deeded his share so divided to him, to the Wades, then the Wades got a good title to the land described in these deeds—whether and notwithstanding he may have taken a homestead in said land, and upon this hypothesis the Wades would be entitled to recover, unless the defendant showed a better title, but the plaintiffs should recover upon the strength of their own title and not upon the weakness of their adversary's."

1. We think the evidence was sufficient to sustain the verdict.

2. In reference to the admissibility of the testimony of

Wade as to the evidence of Durnnell, delivered on a former trial, we think the court committed no error. It appeared that he had killed a man, was advised to go off, and had not been heard of in several years.

Wade swore he did not know where he was, had inquired of his wife and sisters, who either did not know where he was, or refused to tell him. The inaccessibility of the witness was reasonably established, and rendered the secondary evidence admissible.

3. The deeds from James to Robert and from Robert and wife to the Wades were properly admitted in evidence under the pleadings in the case, for whether the latter was void or voidable, it tended to show the privity, between the lessors of the plaintiffs and to establish their right to use the names of Robert and wife to recover on that demise in the declaration if they could; besides, we do not think the deed void in reference to the recent legislation concerning the alienation of homesteads, and fixing the equities in all sales made prior to 1877. If the deed was made either to secure a debt due by the estate of James J. Taylor, the ancestor, and antedated the homestead law of 1868, it was a proper charge upon the estate, and the homestead would not be shielded against such a debt; or if as title, it should not have been excluded as evidence but introduced subject to have its legal effect construed by the court. See Code, section 2712.

4. But it is unnecessary here to hold that a recovery could have been had on that deed, for the rule is well settled, if a recovery is had in ejectment upon a declaration containing several demises, and there be but one good, the verdict will be upheld.

5. In reference to the charge of the court as to the plaintiffs' right to recover upon the title of Robert and wife, we can see no legal objection thereto, for if the deed was void and could not and did not convey the property to the Wades, then the title remained in the beneficiaries of the homestead, and the suit having been brought in

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Carter, administrator, *vs.* Monroe *et al.*

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the year 1874, and pending at the date of the act of 1876, a recovery could be had thereon. And if James J. Taylor in his lifetime, his executors and heirs after him, held, owned and claimed the whole land for over twenty years, and on a division the land in controversy was allotted to Robert and wife, that would create such a title as would authorize a recovery ordinarily against one who had the possession but not the title, and we think the court committed no error in so charging.

6. What title did Gunn acquire under the marshal's sale in 1873? His mortgage decree of foreclosure and *fi fa.* was for and against the undivided one-third of the entire lands, and so it was sold, and by law gave him the status of a tenant in common as to one undivided third, notwithstanding the division and in spite of the homestead, this debt being dated in the year 1867. This, and no more than this, was the full measure of his legal rights, and when he evicted the tenant of the Wades from the actual possession of the entire land that was allotted to them, he obtained no title thereto, but only to one undivided third, and could not hold the same against the title set up by the plaintiffs in ejectment under the law and evidence, and we think the court committed no error in refusing the new trial.

Judgment affirmed.

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CARTER, administrator, *vs.* MONROE *et al.*

1. Where, to an action of ejectment an equitable plea was filed, setting up that the deed relied on by the plaintiffs was only a mortgage and the jury so found, but also found a specified amount to be due by the defendant to the plaintiffs and that it be a lien on the land, and a decree was entered accordingly, an execution for the amount so found followed the decree.
2. Where such a *fi. fa.* was levied on the land, and it was claimed under a conveyance made pending the former litigation, the record of the suit was admissible to fix the date of lien of the *fi. fa.*

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Carter, administrator, *vs.* Monroe *et al.*

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3. Where one made a conveyance of land, and on ejectment being brought thereon, he pleaded that the conveyance was only a mortgage, and pending litigation made another conveyance; when the first was held to be a mortgage it was a lien from its date, and the junior deed was subject to it.
4. A new trial will not be granted for failure to give a request which, if correctly given, could not have affected the verdict.
5. The verdict was supported by the evidence.

Evidence. Executions. Mortgage. Lien. New trial.  
 Before L. C. HOYL, Esq., Judge *pro hac vice*. Randolph Superior Court. May Term, 1880.

Reported in the decision.

KENNON & HOOD, for plaintiff in error.

C. B. WOOTEN; J. T. FLEWELLEN; W. C. WORRILL,  
 for defendants.

JACKSON, Chief Justice.

Monroe and Douglass caused to be levied an execution, predicated upon a decree in equity, on a tract of land as the property of Richard V. Carter. The same Richard V. Carter claimed the land levied on as administrator on his father's estate, alleging that the land was not his own property, but belonged to the estate of his father; on that issue, whether it was his own or his father's property at the date of the decree, the jury found that it belonged to him individually, so far as the plaintiffs' debt was concerned, and was subject to the execution; and the court below having refused a new trial, as administrator on his father's estate, Richard V. Carter brings the case here.

The grounds of the motion for a new trial, besides the usual grounds that the verdict is contrary to law and evidence, etc., are, that the court erred in admitting in evidence the execution, as it did not follow the decree, and as the decree did not follow the verdict; and in

admitting in evidence the record of the ejectment between Monroe & Douglass, of the one side, *vs.* Carter, on the other, and also deeds to the land from Carter to Hood & Kiddoo, and from Hood & Kiddoo to Monroe & Douglass, on the statement of plaintiffs' counsel that these papers were introduced to show when their land was levied on the land levied on attached; and in charging the jury to the effect that if this record and deeds showed that before Carter made the deed to his father, on which his claim was based, he had previously given a conveyance which, in the ejectment suit (to which an equitable bill was filed) and the verdict therein, was held and determined to be a mortgage, then such mortgage would bind the land from its date and would give a lien superior to Carter's deed to his father, and it would be their duty at that event to find the land subject; and that the jury failed to charge the jury that a debtor had the right to prefer one creditor to another, and to make a bona fide conveyance for that purpose.

The facts are these: The execution is dated the first day of April, 1876, and was introduced in evidence to show levy and possession of defendant Carter proven, and the plaintiffs closed. Then the claimant showed a deed from himself to his father, dated the fourteenth day of April, 1875, consideration forty-one hundred dollars, and his appointment of administration on his father's estate dated the first day of April, 1877. He then testified that he is now administrator and is the same man who made the deed to his father, and the defendant in execution; that the deed was executed when it bears date; that he had turned the land over to his father and worked it for himself; that he owed his father forty-one hundred dollars; that he sold him the land to pay it; that when levied on he was holding the land for his father; that he gave no other evidence of indebtedness for what he owed his father, but it was borrowed money, three thousand dollars at one time, soon after the war, and the balance at other times.

The plaintiffs then introduced in reply to this title of claimant, the ejectment suit for the land against Carter on the demise of Monroe & Douglas, brought in March, 1873, and returnable to the May term, 1873, of Randolph superior court, to which suit a plea of not guilty was filed, and an equitable plea setting up that the conveyance dated in 1871, held by plaintiffs, did not convey title but was only a mortgage to secure a debt, and that the plaintiffs were indebted to him in equitable set-offs, etc., etc. On the hearing the jury found for the defendant Carter, so far as to make the conveyance a mortgage only, and found for the plaintiffs, Monroe & Douglas, twelve hundred and fifty-two dollars and eighty-one cents, less three hundred and thirty-eight dollars and seven cents, and the court rendered a decree thereon for nine hundred and fourteen dollars and seventy-four cents, on the twelfth day of May, 1875, and the execution was issued on this decree for that amount, which was to be paid out of this land and by the verdict and decree to have a lien thereon.

It seems that other parties were interested in that litigation and in the verdict and decree, but the rights of these plaintiffs were thus settled by the verdict and decree.

1, 2, 3. So that the court did not err in admitting the execution, for it followed the decree, nor in admitting the record of the ejectment cause and the equitable plea and verdict and decree, for they were essential, with the conveyances, to fix the lien of the plaintiffs; nor in the charge, for the mortgage in equity operated as a lien from its date as against the Carters, father and son, who seemed both, certainly the son, to have had full knowledge actually of the whole affair, and if the father did not, the *lis pendens* and his purchase during the pendency charged him with notice. The execution follows the decree exactly, the court deducting the set-off from the plaintiffs' debt, and the only pretext of difference is that the decree



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 Jones vs. Ehrlich.
 

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also covered other matters between other parties did not affect these plaintiffs in execution.

4, 5. The verdict is fully sustained by the evidence. About a month before the decree, Carter sold the land to his father during the pendency of the ejectment and the case, and the whole affair looks fraudulent, as his father held no note nor other evidence of the son's indebtedness to him. But without regard to any badges of fraud—such as the relationship of the parties—the retention of possession of the land—the character of the interest, etc., etc., it is enough to say that the decree is supported by the admissions in the answer or equitable plea of Carter sufficient to give priority to the plaintiffs' lien on the claimant's deed, which was four years junior to the plaintiffs' mortgage.

The request to charge about the debtor's right to discharge his creditors was not in writing, and if it had been it would be an error to refuse a new trial on this ground, as it could not have affected the verdict.

Judgment affirmed.

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### JONES vs. EHRLISCH.

Under the constitution of 1868 and the Code, §2016, cash money vested before it is finally set apart as an exemption by the debtor. An exemption of money is void as against a debt prior to the exemption.

Homestead. Before Judge WRIGHT. Dougherty vs. Ehrlich. Superior Court. April Term, 1880.

This was a suit on notes made by D. W. Price & Son to Ives, Faulk & Co. Ehrlich obtained possession of the notes and brought suit and garnished W. T. Jones for a sum of money he had in his hands belonging to D. W. Price, one of the defendants. Pending the suit against Price & Son, and before judgment against them, D. W. Price applied to the ordinary for homestead exemption.

exemption, and had the same set apart to him in due form. He took the homestead and exemption for his family consisting of a wife and minor children. He forgot to include in his application the sum of money in the hands of W. T. Jones, but immediately upon the discovery of the omission, he made application for a supplemental homestead and exemption in accordance with the statute. The original homestead and exemption, as was the supplemental one, were duly passed by the ordinary, and the usual orders exempting the property from levy and sale were passed. The ordinary passed an order exempting the money of D. W. Price in the hands of W. T. Jones from process of law and vesting it in D. W. Price and family. When this was done, Jones paid the money over to Price, under the said order of the ordinary, less sixty dollars, which he retained in his hands.

The debt on which the garnishment and suit were founded was contracted subsequent to 1868 and prior to the adoption of the constitution of 1877. The jury found against the garnishee for the full amount that was in his hands, notwithstanding the fact that he had paid it all over to Price, the applicant for homestead and exemption, except sixty dollars, under the order of the ordinary.

Jones made a motion for a new trial, which was refused, and he excepted.

L. ARNHEIM; W. T. JONES; D. A. VASON; C. B. WOOTEN, for plaintiff in error.

D. H. POPE, for defendant.

CRAWFORD, Justice.

In this case an exemption in money was set apart by the ordinary for the benefit of the debtor's family, as against a debt contracted prior to 1877, and the question made by this record is, whether this can be done.

*Manning vs. Phillips et al.*

We hold that it cannot. Because the constitution of 1868 declares that there may be an exemption of personal property to *the value* of one thousand dollars, *to be valued* at the time it is set apart, and that the general assembly shall provide by law for the *setting apart and valuation* of said property. The legislature in pursuance of this constitutional provision, did enact, that when the personalty consisted in whole or in part of money, before the same shall be allowed by the ordinary, it shall under his direction be invested in personal property and returned by schedule, as is the case with other property, and in no case shall the allowance of cash without such investment be a valid exemption. Code, §2016.

The ordinary having set apart and exempted by his final judgment, upon the application of D. W. Price, the sum of \$265.00 in cash, the said exemption is illegal and void and must be so held.

Judgment affirmed.

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MANNING vs. PHILLIPS *et al.*

Where the comptroller-general issued an execution against a tax collector and his securities, and the same was paid off by the latter and subsequently levied upon the property of the principal for reimbursement, to which an illegality was filed setting up payment in full by the defendant to the plaintiffs, and the papers returned to the Cobb superior court :

*Held*, that there was no error in dismissing the illegality as it was not the proper remedy.

Illegality. Tax. Jurisdiction. Before Judge LESTER, Cobb Superior Court. November Term, 1879.

Reported in the decision.

W. T., W. J. & R. WINN ; C. D. PHILLIPS ; GOBER LESTER, for plaintiff in error.

D. & T. B. IRWIN ; W. M. SESSIONS, for defendants.

HAWKINS, Justice.

The plaintiff in error was tax-collector for the county of Cobb for the year 1873, and recorded his bond in conformity to law with the defendants in error as his sureties.

On the thirtieth day of July, 1874, said Manning having failed to settle his accounts with the state, W. L. Goldsmith, the then comptroller-general, issued a *fi. fa.* for the sum of one thousand four hundred and fifty-six dollars and fifty-eight cents. On the eighth day of December, 1874, the sureties, B. Stripling, H. L. Bennett and H. G. Cole, paid to William D. Anderson, the attorney for the comptroller-general, the full amount of said *fi. fa.*, and had the same transferred to them.

In September, 1878, and on October 2d, the *fi. fa.* was caused by the sureties to be levied upon certain real and personal property of George N. Manning, principal, for their reimbursement as his sureties.

On the third day of October, 1878, the said George N. Manning filed an affidavit of illegality, alleging, among other things, that since the payment and transfer of the *fi. fa.* by the comptroller-general to the defendants in error, said Manning had repaid to them the full amount of said *fi. fa.*, principal, interest and costs, which affidavit of illegality was accepted by the sheriff, and returned with his actings on the *fi. fa.* to Cobb superior court.

At the November term of Cobb superior court, when the cause was called and on trial, the plaintiffs in *fi. fa.* moved the court to dismiss the illegality upon the ground that if the plaintiff in error had any remedy it was not by illegality under our law.

The court sustained said motion, and dismissed the illegality upon the ground that it was not the proper remedy, the execution not having been issued from Cobb superior court. To which plaintiff in error excepts, and that is the error complained of.

The proceeding by illegality is a statutory remedy in Georgia, and was substituted in the place of the writ of *audita querela* in England. See 34 *Ga.*, 427; the writ of *audita querela* in England was a form of action which lies for a defendant to recall or prevent an execution on account of some matter occurring after judgment, amounting to a discharge. See 1 *Bouv. Law Dic.*, page 169. One of the characters of the suit was that its venue was of the court issuing the execution, its province was to deal with its own judgment, and our legislature in adopting the illegality proceeding, seems to confine the office of illegality to executions and judgments issuing out of and returnable to the courts, and by express provision of law requires the illegality to be returned by the levying officer to the court from which it was issued. See Code, section 3664 *et seq.*

The *fi. fa.* in question was issued by no court, but by the comptroller-general, and whatever remedy the plaintiff in error may have, we are satisfied that the one by illegality is not the legal mode.

Let the judgment of the court below be affirmed.

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#### HARVEY vs. BOSWELL.

1. Where in an action for damages the witnesses differ as to the value of the property injured, the ordinary rules of weighing testimony, such as honesty, disinterestedness, opportunity for knowledge, and intelligence, should be resorted to before attempting to reach a satisfactory result by averaging the values sworn to.
2. The verdict is not contrary to evidence.

Damages. Verdict. Practice in the Superior Court. New trial. Before Judge BUTT. Talbot Superior Court. March Term, 1880.

Reported in the decision.

D. W. PORTER; M. BETHUNE; H. C. PEEPLES, for plaintiff in error.

WILLIS & WILLIS, by JNO. PEABODY, for defendant.  
JACKSON, Chief Justice.

The plaintiff in error brought suit against the defendant for shooting a mule which had entered defendant's close. The action was brought under sections 1443 and 1445 of the Code, which require worm fences to be five feet high, and in the event any animal shall break into an enclosure with a lower fence, there shall be no recovery for the trespass committed by it, and if the owner of the close kill or injure the animal, the owner of the animal may recover three times the damage done him. The jury found for plaintiff twelve dollars, and he moved for a new trial on two grounds: first, that the court charged to the effect that the jury "could not ascertain the value of the mule by adding the several values of the several witnesses and dividing the same by the number of witnesses as to the value, unless they had failed by other methods."

1. We do not think that this charge is error. If a jury should so determine the value of the damaged property as the original and better mode of ascertaining it, one very high witness, in estimating it might control half a dozen low witness who all agreed in their estimate, and make the verdict double what it ought to have been from the testimony of all the half dozen equally intelligent and truthful with himself, or perhaps all more reliable and having greater opportunities of judging than himself. Such a rule would enable a bad party to raise or lower the verdict by his own testimony in the teeth of the concurrent testimony of other disinterested witnesses. We think, with the court below, that the ordinary rules of weighing testimony—such as honesty, disinterestedness, opportunity to know, and intelligence—should be exhausted before resort should be had to the mode proposed. The principle ruled in the case in 58 *Ga.*, 534,

would not authorize what the plaintiff in error seems to have desired the court to charge. This court in that case upheld a verdict which did not exactly accord with the amount sworn to by any one witness, but which was evidently a sort of compromise or average verdict; but to uphold such a verdict as not contrary to the weight of the evidence is one thing, while to instruct the jury that striking an average of values is as good a way as any other of ascertaining the true value of a thing destroyed, without regard to the intelligence, capacity and disinterestedness of the various witness, is quite another thing.

2. The other ground is that the verdict is decidedly against the weight of evidence. In such a case, where the circuit judge is satisfied with the verdict, we are not at liberty to control the discretion with which the law invests him, unless that discretion is abused.

In this case the witnesses put the value of the mule from three or four to sixty or seventy-five dollars, and a verdict of twelve dollars is supported by the evidence. The mule seems to have been quite old and in bad plight—the fence complained of seems to have been a dividing fence between the former owner of the mule, who had sold the animal to plaintiff, and who appears to have worked the land on the other side perhaps, and while the verdict is small, the jury and presiding judge have passed upon the case with the light of witnesses in their immediate presence shining upon it, and the case must be very strong and clear to justify this court in unsettling their conclusions.

Judgment affirmed.

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Jones, ordinary, vs. Collier *et al.*

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JONES, ordinary, vs. COLLIER *et al.*

While sitting at chambers for county purposes, an ordinary rendered a judgment finding that the county treasurer had abandoned his office and removed from the county. He therefore declared the office vacant, and appointed a person to temporarily fill the vacancy. On the next day he rendered a judgment which recited that persons appointed to examine into the accounts and vouchers of the said treasurer, under §3921 of the Code, found and reported a deficit of \$3,669.15, which he failed to pay over on demand; that properly authenticated orders had been presented to him and payment refused; and therefore judgment was rendered against him and the sureties on his official bond:

*Held*, that the ordinary had legal power to render such a judgment, and the *fi. fa.* issued thereon should not be quashed on demurrer.

Ordinaries. County matters. Officers. Judgment. Jurisdiction. Before Judge CRISP. Early Superior Court. October Adjourned Term, 1879.

Reported in the decision.

E. C. BOWER, for plaintiff in error.

R. H. POWELL, for defendants.

CRAWFORD, Justice.

The plaintiff in error, as the ordinary of Early county, issued a *fi. fa.* against the defendants in error as the sureties of T. J. Cartledge on his bond as the county treasurer. The defendants in *fi. fa.* filed their affidavits of illegality thereto, and when the same came on to be heard, they then submitted a general demurrer to the *fi. fa.* and moved to quash the same, which demurrer was sustained, the *fi. fa.* quashed, and this is the ground of the plaintiff's exception.

On the argument of the demurrer and the motion to quash, the order vacating the office of the county treasurer, and the judgment of the ordinary which preceded the issuance of the *fi. fa.*, were read and considered by the court in connection therewith. The only question made



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Jones, ordinary, vs. Collier *et al.*

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by this record is, did the ordinary have the legal right to issue this *fi. fa.*? This depends upon the facts and the law applicable to the exercise of the power. It appears from the record, that on January 17th, 1876, the ordinary, "at chambers," declared the office of county treasurer vacant, because Cartledge had ceased to perform its duties, had abandoned the office and removed from the county; that, therefore, his vacancy had been filled until a successor could be elected and qualified. On the eighteenth, the following day, "at chambers," the ordinary takes further action in the premises and declares, that it having been made to appear, to him by a report of persons appointed under §3921 of the Code to inspect and examine into the accounts and vouchers of the said treasurer, that there was a deficit of \$3,669.15, and that he had failed to pay the same on its being demanded; and it being further made to appear, that properly authenticated orders had been presented to said treasurer, which he refused and failed to pay; and having filed his official bond with S. J. Collier *et al.* as his securities, it was therefore ordered and adjudged that judgment be rendered against him and his securities for the sum aforesaid, and that execution do issue accordingly." These proceedings which are set forth in full in the record, are from the minutes of the ordinary when sitting for county purposes.

Under the facts stated, was the ordinary clothed with power to issue the *fi. fa.* against the defendants? By §135 of the Code all offices in this state are vacated, among other things, by abandoning the office, and ceasing to perform its duties; or by the incumbent's ceasing to be a resident of the state or county for which he was chosen. By §337 the ordinary, when sitting for county purposes, has original and exclusive jurisdiction in filling all vacancies in county offices by appointment.

Section 563 provides that when the county treasurer fails to pay any order which is entitled to payment, or other legal demand upon him, or to pay any balance in his hands to his

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Jones, ordinary, vs. Collier *et al.*

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successor, the ordinary may issue execution against him and his securities for the amount due, as against a defaulting tax collector. And it is provided in §524, that on such failure by a tax collector, as well as all persons having in their hands any county money, the said ordinary shall issue executions against such persons and their securities for the full amount appearing to be due, as the comptroller-general issues executions against defaulting tax collectors. The comptroller-general is empowered under §909 to issue *instante* executions against any collector failing to settle with him under the law.

Applying the law to the facts in this case, the ordinary finding that the county treasurer had absconded, thereby abandoning his office and ceasing to perform its duties, declared the same vacant, and appointed a successor. He further found, under inquiry made as provided by law in §3921 of the Code, that the said county treasurer had in his hands county money to the amount of \$3,669.15, and that he failed to pay the same on its being demanded; and that properly authenticated orders had also been presented to him which he had failed to pay; he therefore issued an execution against him and his securities as he was authorized under the law to do, for the said sum of \$3,669.15 so due the county, and this was done as it would have been in cases of defaulting tax collectors.

We think that the *fi. fa.* would have been more technically correct, if it had set forth in terms that the sum of \$3,669.15 was the balance in his hands due and payable to his successor, and which he had refused to pay, and therefore the *fi. fa.* issued. Still we hold that it is substantially set forth, that it is legally correct and the judge erred in his judgment quashing the same. The demurrer to the *fi. fa.*, and the order and judgment from the minutes of the court of ordinary, sitting for county purposes, which were before the judge below, are all the matters considered and disposed of by this court in this judgment.

Judgment reversed.

## MILLER vs. HENSLEY.

Where upon a suit in a justice court, judgment was rendered for \$31.00, and an appeal entered to a jury in the same court, which was dismissed on the trial of the same, the appellant was precluded from the remedy by *certiorari* on the original judgment, even though applied for within three months from its rendition.

Appeal. *Certiorari*. Justice Court. Before Judge CRAWFORD. Muscogee Superior Court. November Term, 1879.

Reported in the opinion.

THOMAS J. CHAPPELL, by brief, for plaintiff in error.

THORNTON & GRIMES, for defendant.

HAWKINS, Justice.

This was a *certiorari* from a justice court tried before Judge Crawford, in Muscogee superior court.

Hensley had sued Miller in a justice court and obtained a judgment for thirty-one dollars; from this judgment of the justice, Miller appealed to a jury in a justice court, and on the trial of the same, the appeal was dismissed—when, and within ninety days, the said Miller filed the petition for *certiorari*, after its dismissal, but upon grounds that existed at the entering of the appeal.

The judge dismissed the *certiorari*, and this is the sole complaint.

By the constitution of 1868, and the laws made thereunder, there was no appeal allowed in justice courts from the justice to a jury in that court, but an appeal was allowed from a justice court to the superior court in all cases involving amounts of fifty dollars or over; where a judgment was rendered in a justice court under fifty dollars, *certiorari* was the remedy, and there could be no appeal.

This court held in the case in the 46 *Ga.*, p. 41, that the right of appeal from a justice court to the superior court in cases involving over fifty dollars was the remedy, and no right to *certiorari* existed.

By the constitution of 1877, an appeal is provided in all cases tried in a justice court. In cases less than fifty dollars, to a jury in the justice court; in cases over fifty dollars, to the superior court, as was provided under the constitution of 1868. The acts of 1878—see pamph. pp. 142-153—provides for *certiorari* in cases under fifty dollars after and from the judgment on appeal.

"It is hardly to be supposed that it was intended to give the right of *certiorari* and of appeal in the same class of cases." The plaintiff in error had the right to enter an appeal to a jury from the judgment of the justice, but he did not have the right to a *certiorari*, the constitution of 1877 and the acts of 1879 having established trial by jury on appeal in lieu of the right of *certiorari*, and allowing a *certiorari* from the result on the appeal. Litigants in controversies of fifty dollars and under ought to be content with the right of trial before the justice in the first place, appeal to a jury in the second, and *certiorari* in the third place, and finally writ of error to this court.

Out of one of the four trials they ought to be able to obtain justice.

Judgment affirmed.

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THURSTON et ux. vs. WILKERSON.

Where in 1872, a justice court summons, in a suit for more than fifty dollars, was made returnable in less than twenty days, the court held at such a time was without jurisdiction. Such a defect was not cured by an agreement to waive all defects; and evidence to show such an agreement was not admissible.

Justice courts. Jurisdiction. Waiver. Evidence. Before Judge WRIGHT. Calhoun Superior Court. March Term, 1880.

Two suits for \$100.00 each were brought in a justice court by Thurston *et ux vs.* Wilkerson; judgments were rendered in twelve days from the beginning of the suits. *Fi. fas.* issued and were levied, and affidavits of illegality filed; the justice sustained the illegalities, and plaintiffs appealed. On the trial in the superior court (the two cases being submitted to the court without a jury) plaintiffs offered to prove by the justice that he had four notes of \$50.00 each, on which the suits were founded; that defendant begged him to consolidate the suits and agreed to waive objections and acknowledge service to save costs; and thereupon the justice brought two suits for \$100.00 each instead of four suits for \$50.00 each. This evidence was rejected, and upon this error was assigned, after a judgment sustaining the illegalities, and refusing a new trial.

L. D. MONROE; C. B. WOOTEN, for plaintiffs in error.

L. G. CARTLEDGE, by JACKSON & LUMPKIN, for defendant.

JACKSON, Chief Justice.

In this case, which was an affidavit of illegality to an execution from a justice court in the year 1872, while those courts had no stated monthly days on which to be held, the main question is, did the court have any jurisdiction to render judgment, it being held twelve days after summoning the defendant, and the date of the summons?

Section 4141 of the Code, as construed in 56 *Ga.*, 282, settles the point. The amount is over fifty dollars, and there could be no legal justice court until twenty days had elapsed after summons. Even if the sum had been less than fifty dollars, the court would have been illegal and the judgment void, for then the summons must have been fifteen days to make it a legal court.

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*Bessman et al. vs. Cronan et ux.*

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The waiver, or agreement to waive, did not cure the defect and give jurisdiction, 59 *Ga.*, 532, 603; 60 *Ga.*, 629; Code, §§3460, 3461.

Judgment affirmed.

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BESSMAN *et al.* vs. CRONAN *et ux.*

There must exist some special circumstances to authorize equitable interference in behalf of a creditor seeking to collect his debt, even though it be in judgment. Void transfers of property, void homesteads, etc., not being in the way of a judgment at law, do not constitute such special circumstances.

Equity. Before Judge SIMMONS. Bibb Superior Court. April Term, 1880.

Reported in the decision.

LANIER & ANDERSON, for plaintiffs in error.

W. DESSAU; H. F. STROHECKER, for defendants.

CRAWFORD, Justice.

The complainants, Bessman, The Macon Building and Loan Association, O'Connell and Murphy, filed their bill alleging that the defendant, Cronan, is indebted to them, and they pray the aid of a court of equity to enable them to realize on their several claims.

The complainant, Bessman, has *fi. fas.* upon which a return of *nulla bona* has been made, and he alleges that his debtor, Cronan, without consideration, transferred a portion of his real estate to his nephew, Hurley, who, again without consideration transferred, the same to Ellen Cronan, the wife of his said debtor, all of which was done to hinder, delay and defraud his creditors.

The Building and Loan Association alleges for itself that Cronan is indebted to the said association for borrowed money, and to secure the payment of which he, with the

consent of his wife, executed a deed to a certain other portion of land, with power of sale to said association, but that before the execution thereof a homestead had been set apart in the said land for the benefit of the family of the said Cronan, but of which they had no notice. In this connection it is further alleged that this pretended homestead exemption is not good and valid in law, and that the same is a mere nullity, but that it is nevertheless a cloud on their title.

The complainant, O'Connell, alleges that he has been employed by the said Cronan and his wife, Ellen; that they are indebted to him for his services; that he has a laborer's lien on the property of the said parties; that all the transfers thereof were made fraudulently, and that all the property claimed by the said Ellen is liable to the payment of the same.

The complainant, Murphy, alleges that he loaned Cronan \$300.00 without security, believing him to be solvent; that afterwards he took from Cronan and his wife a several note, but which has not been paid; that all the transfers of land and other property were fraudulent; that other lands have been bought, the title to which is in the said Ellen, but were paid for by the money of Cronan, and should be declared subject to the payment of his debts.

The allegations of these complainants constitute the grounds of their respective equities, and upon which they ask a decree declaring that all the aforesaid property shall be subjected to sale and the payment of their several demands.

Equity powers and equity jurisdiction have been steadily invoked and increased until it might well be inquired whether the common law courts are powerless to give any security to rights. It is true that it is enacted that equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law. The chancellor below, after argument had on demurrer to this bill, held that the same be sustained and the bill be dismissed, which judgment is assigned as error.

If the facts set up by each one of the complainants were separately presented, as being sufficient to authorize the interposition and aid of a court of equity, we hardly think that it would be insisted that they were, and the party would be left to his remedy at common law. Their equities are the same severally or jointly considered.

A judgment at law binds all the property of the defendant from its rendition, and all transfers or contracts made of any description to defraud creditors when the same is known to the party taking, are void; if, therefore, the allegations in this bill are true, the transfers of Cronan are not in Bessman's way.

A homestead which is a mere nullity cannot stand in the way of a *bona fide* mortgage *fi. fa.* and prevent a sale under it.

There must exist some special equity to entitle a general creditor whose claim is unliquidated, and not reduced to judgment, to equitable interference in his behalf.

Where complainants have a complete remedy at law equity will not assume jurisdiction, even in cases of fraud.

Judgment affirmed.

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EINSTEIN, ECKMAN & COMPANY vs. BUTLER.

1. Where the evidence was conflicting, this court will not interfere with the discretion of the court below in refusing a new trial on the ground that it is contrary to evidence.
2. Where in an action of ejectment based on title conveyed by a deed given to secure a debt by notes, the defendant sought to establish usury in the notes by parol, the admission of evidence showing the consideration of the notes and deed was proper, and did not violate the rule that a written contract could not be varied or contradicted by parol.

New trial. Evidence. Before Judge HOOD. Early Superior Court. April Term, 1880.

Reported in the opinion.



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Einstein, Eckman & Company *vs.* Butler.

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WARREN & HOBBS; R. H. POWELL; JNO. T. CLARKE & SON, for plaintiffs in error.

E. C. BOWER, for defendant.

HAWKINS, Justice.

It appears in this case that Einstein, Eckman & Co. brought ejectment in Early superior court against N. O. Butler for the lands in controversy, and relied upon a deed to the premises from said Butler to them, dated on the second day of January, 1873.

To this action the defendant pleaded, among other things, that on the day the deed was executed and delivered, he made his two promissory notes for two thousand and eight dollars and sixteen cents each, and delivered the same to the plaintiffs. Said notes were for the purchase of goods and to pay past indebtedness to said plaintiffs, with twenty-five per cent. interest added in the face of said notes, one due at sixty and the other at ninety days, and that the deed was made to secure the said notes, and was part of a usurious contract. Butler objected to the interest, but plaintiffs said they would not press him.

It seemed that before that time Butler & Brown were in partnership, and had bought largely of plaintiffs and were, on said second day of January, 1873, indebted to them. The transactions continued for several years, and covered a multitude of matters.

The plaintiffs testified on the trial that there was no usury in the deed, and if there was it was by error in calculation. Plaintiffs objected to the evidence of Butler as to the amount of the two notes, and the rate and amount of interest put in the face of the notes as being contradictory of the notes.

A good deal of evidence, including the deed, was introduced, and after the charge of the court the jury rendered a verdict for the defendant, when a motion was made for a new trial on various grounds. The motion for new

trial was refused by the court, but plaintiffs in the bill of exceptions only assign error on two of the grounds in the motion, and our judgment will be confined to those.

1. In not granting a new trial because the verdict was contrary to, and unsupported by, the evidence, and contrary to law.

As to this complaint, we see no error in the refusal of the court to grant the new trial. The evidence was conflicting, the plaintiffs showing that the deed was not a part of a usurious contract; the defendant swearing that it was, and contained twenty-five per cent. interest, which, on the second day of January, 1873, was, by the laws of this state, illegal, and made void said deed as title.

The jury were the judges of the testimony, and adopted the theory of the defendant, and the court was satisfied with the verdict, and we will not reverse the decision of the court in refusing the new trial. This court has announced repeatedly the law that when a verdict of the jury is supported by a sufficiency of evidence, though not by the strength of the whole evidence, and the court below is satisfied with it, this court will not disturb the result.

2. The second ground was because of error in admitting the testimony of Butler as to the consideration of the notes, and the inserting in the face thereof twenty-five per cent. of interest.

There was no error in allowing evidence showing the consideration of the notes and deed to establish the usury, and such evidence does not infract the rule that parol evidence is inadmissible to contradict or vary the terms of a written contract.

Let the judgment be affirmed.

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Lowe, guardian, *vs.* Burkett.

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LOWE, guardian, *vs.* BURKETT.

Process returnable to the April term, 1873, of Twiggs superior court, was served fourteen days before the beginning of the term. The names of counsel were marked on the bench docket as appearing for the defendant, and the following entries were made by the presiding judge: "Oct. adj., 1873, appearance term of term. April, T., 1874, put to heel. Oct. T., 1874, judgt." The judgment was by default:

*Held*, that under the facts of this case, the defect in the service was waived, and a levy founded on the judgment so rendered should not be dismissed on the ground that it was void.

Service. Waiver. Judgments. Before Judge PATE. Twiggs Superior Court. March Term, 1880.

Reported in the decision.

LANIER & ANDERSON; HILL & HARRIS; J. T. GLOVER, by brief, for plaintiff in error.

JNO. RUTHERFORD; BACON & RUTHERFORD, by L & H. COBB, for defendant.

JACKSON, Chief Justice.

Lowe as guardian levied a *fi. fa.* on a tract of land as the property of Burkett. It was claimed by Mrs. Burkett. The original declaration having been put in evidence, showed by the sheriff's entry thereon, that the defendant, Burkett, had been served only fourteen days, instead of fifteen days before court. It further appeared from the bench docket that the names of counsel were marked for defendant, and the following entries were made in the handwriting of Judge B. Hill, then judge of the court, "Oct. adj., 1873, appearance term of term. April T., 1874, put to heel. Oct. T., 1874, judgt." The case was made returnable to April term, 1873, and fourteen days before that term the defendant was served. On these facts, on motion of counsel for claimant, the

court dismissed the levy, and this is the error assigned.

The defendant should undoubtedly have been served fifteen days before the term of the court to which the writ was returnable. 57 *Ga.*, 244. The sole question is, did the service only fourteen days before court make the proceeding void so as not to be cured by the judgment after a delay of two terms, under the facts disclosed by the bench docket?

It will be observed that the process is all right, and the only defect is that the service was one day less than is required. The objection is not to the process, but to the service, and that had the effect of bringing into court the defendant by his counsel—Hall & Poe, and J. H. Jones. It also seems to have had the effect of delaying the cause from April term, 1873, to November term, 1874, before judgment was rendered against him.

It is true that this court did hold, that when a justice of the peace held a court not at stated times fixed by law, but for the trial of a special case, it must be held strictly twenty days after the summons, or the whole proceeding would be void. 59 *Ga.*, 532. But that is because there was no legal justice court to try that case on any day before the twenty days had expired.

It is true also that in *Dugan vs. McGlaun*, in 60 *Ga.*, 353, the question is put whether a judgment in the superior court with but fourteen days' service is not void, but it is not so ruled, and that case went off on the other ground therein set out.

The superior court had jurisdiction of the subject matter of this suit at the April term, 1873, and the preceding terms; it had issued legal process, properly directed, to have this defendant served; he was served, and the only defect is that he was served one day too late. Yet he did have notice and appeared by counsel, and they seem to have so managed his case as to make the October adjourned term, six months after the April term, 1873, the appearance term of the court, to have the case

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Lowe, guardian, vs. Buskett.

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put to the heel at the next term, and then continued to the next term, when judgment was rendered against him. So that he was really served more than eighteen months before judgment on a plain note, to the payment of which he made no issuable defense on oath. The process is legal, the service is defective, but is it absolutely void? Had a motion been made at the April term, 1873, to dismiss the case, would it have been dismissed, or would time have been granted to perfect service, or to make the next the appearance term, the defendant being in court by his counsel? We think that the dismissal of the suit would hardly have been ordered, but that the fault being in the sheriff and not the party, time would have been given to perfect service, if the defendant was not present by counsel; but if he was so present, the next term would have been considered the appearance term; and so Judge Hill seems to have directed from his bench docket entries. It is true that the minutes should have so spoken, or there should have been evidence of record of that order; but that defect could be cured perhaps by an order to perfect or amend the record, or to put on the minutes the judgment making the next term the appearance term of the cause. Code, §§206, sub. sec. 6, 3499, 3500. The last section declares that no fixed rule can be laid down on this subject of amending records; and there must be a wide discretion in the court; but it will be exercised "in all cases where such amendment will be in furtherance of justice." It would seem from this record that this is one of those cases.

Could this judgment have been arrested by this defendant at the term it was rendered, or could it have been set aside at his instance afterwards in the light of the entries on the judge's docket? We hardly think so. Code, §3590. Does this claimant occupy a stronger position than the defendant? She is no creditor nor *bona fide* purchaser so far as this record shows. Code, §3596. Appearance and pleading would certainly have waived both process and

service. Code, §3335. By the Code, too, the answering to a case is equivalent to a plea of the general issue. Code, §3458.

It is true, that in 58 *Ga.*, 417, Judge BLECKLEY says it is hardly such pleading as works waiver of *process* and service; but he adds that no definite ruling is made on the point—even if process as well as service was defective, and that case turned on a motion to dismiss made by sureties at the second term on a joint debt, not joint and several, where the principal, the deputy sheriff, did not appear, and where the process was void because directed to the sheriff, who was the plaintiff. No legal excuse was rendered why the principal, the deputy sheriff, had not been legally served, or why legal process had not been issued against him. At the instance of the sureties that case was dismissed; but it is not this case or like it at all. The truth is, that the object of process and service is to bring the defendant into court by himself or counsel representing him, and when that is done they have accomplished the objects of the law. 58 *Ga.*, 504; 25 *Ga.*, 646; 26 *Ga.*, 430; 56 *Ga.*, 517; 31 *Ga.*, 337.

This service and notice of this declaration brought this defendant into court by counsel. Their names would not have been entered for him without his authority. They are too well known to suspect such a thing; and the law presumes that they were employed. Code, §413.

On a careful consideration of the entire law bearing on the case, so far as we have been enabled to examine it, we conclude that the process in this cause being perfect, and the only defect being that the service lacked but one day of the time provided by law, and the defendant having appeared by counsel, and the case having been postponed for three terms before judgment, that the defective service is cured, and that the court erred in dismissing the levy. See 52 *Ga.*, 22; 59 *Ib.*, 327.

Judgment reversed.

## HARVEY vs. THE STATE OF GEORGIA.

1. The verdict is supported by the evidence.
2. The law requires tippling houses to be closed on the Sabbath day ; if the whole house is used for tippling purposes, it must all be closed ; if a part only is so used, that part must be closed. Where a part of a tippling house was used as a bed-room, and between that part and the saloon there was an open way, unclosed by a door or otherwise, keeping open a door for ingress and egress to and from the part used as a bed-room, on the Sabbath day, would amount to a violation of the statute.

Criminal law. New trial. Before Judge BUTT. Talbot Superior Court March Term, 1880.

Reported in the decision.

J. M. MATHEWS ; J. H. MARTIN ; WILLIS & WILLIS ;  
J. H. WORRILL, for plaintiff in error.

H. BUSSEY, solicitor-general, by JOHN PEABODY, for the state.

CRAWFORD, Justice.

Harvey was indicted for keeping open a tippling house on the twelfth day of August, 1877, the same being the Sabbath day.

Upon the trial he was found guilty, and for errors which he claims to have been committed, he moved that the verdict be set aside and a new trial granted.

The principal grounds of error alleged and insisted upon are, that the evidence was insufficient to support the verdict, and that the court erred in its charge to the jury.

1. Then as to the evidence—that Harvey kept a tippling house, was established by all the witnesses ; that he was a single man and occupied the back part of the room or house to sleep in, was also established ; that there was no partition between the front and back part of the room

except of lattice work, and through this there was a door without any shutter, and which made an open and unobstructed way to that end of the room where the liquors were vended and drank, was also established; that there was a back door at the rear end of the house, was also established.

The foregoing facts being undisputed, leaves but a single question remaining—was that door shown to have been open on the twelfth day of August, 1877, the same being the Sabbath, or on any other Sabbath day within two years theretofore?

C. M. Bethune swears that he had seen the back door of this tippling house open on the Sabbath day—that he went before the grand jury at the September term, 1877, and to the best of his recollection it was less than two years before that time.

T. C. Belyou swears that he went to that back door on Sunday and went in—it was to his best recollection within two years of the time he went before the grand jury, in September, 1877.

W. A. Daniel swears that he has seen that house open on the Sabbath day. He says: "I went before the grand jury at the September term, 1877. I saw the back door of Harvey's open on Sunday of that year, and before I went before the grand jury. I went in, and there might have been others in; do not now recollect."

This is the testimony submitted to the jury on the trial, as to the door being open on Sunday, and the only qualification shown is that the witnesses swore according to the best of their recollection, which is all that any upright man can do in giving in his testimony. A jury of the vicinage believed that the charge was true, and that the witnesses were not mistaken. Our opinion is that the proof authorized the verdict.

2. The error complained in the charge of the court is as follows: "If the door of the tippling house was kept open on the Sabbath day, so that persons had ingress and



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*Hays vs. Slade & Etheridge.*

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egress thereto, and persons did go in and out on such days, and if the back room was kept for a sleeping room, and there was a partition between sleeping room and grocery where the liquors were kept, with a door without a shutter, so that persons could pass from one to the other, then he would be guilty of keeping open on the Sabbath day."

We think that the foregoing charge is without legal objection. A tippling house may be used for a sleeping room, or any other lawful purpose. It may be kept open night and day during the week, but on the Sabbath day the law says that it must be closed. How? Absolutely closed, the front, sides, and rear of that part or room which is used for tippling purposes. It makes no difference as to whether any liquors be sold or not, the offense consists in its being open, not in selling, or offering to sell, or giving it away. The law is of force as well at the back as at the front door; it surrounds such a house, if the whole be used for such a purpose; and if only one room, then that room, and commands that all its doors be closed. Nor will an open, unobstructed approach to it make it lawful because that approach may be through a bed-room.

Judgment affirmed.

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HAYS *vs.* SLADE & ETHERIDGE.

The bill of exceptions, as certified to by the judge, must show clearly the errors complained of, or the writ of error will be dismissed.

Practice in the Supreme Court. September Term, 1880.

Reported in the opinion.

E. C. BOWER, for plaintiff in error.

No appearance for defendants.

HAWKINS, Justice.

This was a bill of exceptions filed to the decision of the judge concerning an affidavit of illegality in Early superior court. The bill of exceptions recites as follows:

When the case was called, plaintiff's attorney demurred to the illegality and the several grounds therein stated, and moved to dismiss the same, whereupon the court sustained the demurrer and dismissed the affidavit of illegality, and to which said decision the plaintiff in error excepts, and that is the only assignment of error. The court in certifying to the bill of exceptions, added, "the court did not sustain the demurrer in this case, as set forth in the bill of exceptions, but, on inspection of the records in the case, overruled and gave judgment against the same."

The rule requires the exceptions to be plainly set out in the bill of exceptions, and for failure in this regard this writ of error is dismissed, and we the more readily do this because upon an examination of the grounds of illegality we do not think they were well taken.

Writ of error dismissed.

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SPARKS vs. ROBERTS.

1. Exception to an entire charge will not be considered unless the charge is wrong as a whole.
2. Where the residuary clause of a will provided that, after paying debts, etc., the remainder of testator's land should be divided among certain named legatees, title remained in the executors for the purpose of executing the will; and if prescription began to run against the testator, it continued to run against executors. Nor would it be affected by the minority of one of the residuary legatees, until something was done by which the title passed to her.
3. After prescription began to run against a *feme sole*, her voluntary marriage would not exempt her from the operation of the statute.
4. The married woman's act of 1866, as well as the constitution of 1868 and the act of 1872, removed the disability of married women as to bringing suit.

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 Sparks vs. Roberts.
 

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Husband and wife. Prescription. Title. Minors.  
Before Judge HOOD. Miller Superior Court. October  
Term, 1879.

Reported in the decision.

H. C. SHEFFIELD; D. A. VASON; BROYLES & JONES;  
C. B. WOOTEN, for plaintiff in error.

I. A. BUSH, by JACKSON & LUMPKIN, for defendant.

JACKSON, Chief Justice.

This is an action brought by Mrs. Sparks in the old form of ejectment, whereby the demise is laid in her name in the year 1870, and the action is brought in 1879. She claims title from the will of her grandfather, who died twenty-ninth day of September, 1853, and the will was admitted to probate in the next year, 1854. Jones, her grandfather, held a regular chain of title from the grantee of the state, and the defendant held under the same grantee, but under a younger deed, and claims title by prescription, having been in adverse possession of the land ever since the year 1852. Jones' title from the grantee runs back in regular chain to February, 1826, and Roberts', the defendant's, to December of the same year. Demises are also laid in the names of two trustees for Mrs. Sparks, named in her grandfather's will, and in the names of the executors of that will.

The important facts on which the legal questions made in the cause arise, are that the defendant's possession began under regular deed for value in 1852, two years before Jones, the testator died, but during the minority of his granddaughter, Mrs. Sparks—that she became of age some month or two before her marriage—and has been under coverture ever since that time. By the will this lot is not mentioned or devised at all, but by the third item of the codicil, a witness for plaintiff, being one of the

sons and executors of the testator, testified that the testator intended it to go to this granddaughter—that item of the codicil, however, leaves all his lands outside of Burke, Emanuel and Washington counties, to be divided equally between testator's children and this grandchild, after enough has been sold to pay his debts, if another fund should prove insufficient.

1. Exception is made to the entire charge of the court, but no error is specified therein either in the motion for a new trial or in the assignment of errors in the bill of exceptions. Therefore that exception, being too general, cannot be considered under repeated rulings.

2. So that the sole question is this: Is the verdict contrary to the law and the evidence—that verdict being in favor of the defendant?

If the plaintiff showed title out of Jones in herself through the will, it would give her the older and better title unless she lost it by the lapse of time, and Roberts', the defendant's, adverse possession.

It is not clearly established that the title went into her out of the testator by his will. Debts had to be paid and a division made and shares equalized, and the record does not show that this has been done, or when or how done, at all satisfactorily. So that we could not say that the verdict was against the law and the evidence on this very threshold of the cause, with such a long, honest and adverse possession in the defendant.

But the statute began to run in the lifetime of the testator, and it was the duty of his executors to have reduced the land to possession in order to divide it with the other lands under the terms of the will and codicil. Until some act was done which gave this infant the title, her disability certainly could not save the land from the prescriptive title acquired by the defendant—the title being in the executors to sell and pay debts in certain contingencies, and then to divide among legatees. They seem to have given it in for taxes and paid taxes on it.

3. Again, if the title passed into her at the death of the testator, she became of age before her marriage, and thereby being sole and *sui juris*, she could sue, and she could not claim the exemption under §2926 of the Code, because she voluntarily caused the disability after the statute began to run against her. Code, §2927; 48 Ga., 329.

4. Again, if her coverture did exempt her from the operation of the prescriptive statute until 1866, when the act was passed making her a *feme sole* as to her separate estate, that act, to all intents and purposes, as well as the constitution of 1868, removed the disability and gave her the legal right to sue.

It is true that the act of 1872 was passed, conferring that power explicitly upon married women, but was it not virtually given before by the act of 1866 and the constitution of 1868? It would seem so.

Again, trustees were appointed by the will to act for Mrs. Sparks in respect to the property left her in the will, and whilst the only witness, Mr. Jones, does say that there was no formal acceptance of the trust, yet he and the others did so far act as to bring suit for the land, and afterwards to dismiss it, according to his own testimony; and the jury might have found that the trust was virtually accepted. If so, the trustees are barred and the bar attaches to the *cestui que trust*.

In view of all the facts, we are quite clear that the verdict for the defendant is right under the law and evidence disclosed in this very obscure, badly written and unsatisfactory record, and that it must be upheld.

Judgment affirmed.

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Fullington, for use, *vs.* Killen, administrator, *et al.*

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FULLINGTON, for use, *vs.* KILLEN, administrator, *et al.*

1. Where suit was brought on a promissory note having several makers and indorsers, and judgment obtained agaist two of them, they only being served, it barred another suit on the note as to them.
2. Where suit against two makers of a promissory note was barred by reason of a former recovery, their residence did not confer jurisdiction on the superior court of their county in a subsequent suit against all of the makers and indorsers.

Actions. Former recovery. Jurisdiction. *Venue*. Surety and indorser. Before Judge SIMMONS. Houston Superior Court. April Term, 1880.

Reported in the decision.

WARREN & GRICE, for plaintiff in error.

DUNCAN & MILLER; H. M. HOLTZCLAW, for defendants.

CRAWFORD, Justice.

A promissory note was made by James N. Smith and Laidler & Pate as principals, and indorsed by R. O. Pate & Co. The firm of Laidler & Pate, makers, was composed of John Laidler and R. H. Pate. The firm of R. O. Pate & Co., indorsers, was composed of R. O. & J. H. Pate.

Only Smith and Laidler, of all these parties, resided in Houston county, where this litigation originated. In February, 1874, all of them were sued in the county court of Houston, on this same note. Smith, the individual maker, and Laidler, of the firm of Laidler & Pate, makers, alone were served, and judgment was rendered against them. In November, 1879, another suit was commenced in the superior court of Houston county, on the same note in favor of the same real plaintiff and against the same parties, except Smith, who had died, and whose

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Fullington, for use, vs. Killen, administrator, *et al.*

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administrator was sued in his stead; all in this suit were served except R. H. Pate; Killen, the administrator of Smith, and Laidler only resided in Houston; the others were non-residents. Laidler, one of the partnership makers, pleaded to this suit his discharge in bankruptcy; Killen, administrator of Smith, pleaded a former recovery.

R. O. Pate and J. H. Pate pleaded to the jurisdiction of the court in connection with the former recovery against Smith and Laidler, which they specially pleaded.

The case as here stated, with the facts either admitted or supported by uncontested proof, was submitted to the judge without the intervention of jury, who, after considering the same, rendered a verdict and judgment in favor of the defendants and against the plaintiff, to which judgment the plaintiff excepted and assigns the same as error.

1. The legal question thus made for our adjudication is, whether that judgment, so rendered by the court, was legal under the facts presented. This turns on the pleas. That of former recovery being established, entitled Killen, the administrator, and Laidler, to a judgment in their favor, independently of the plea of bankruptcy which had been pleaded by Laidler. This same plea was also relied upon by the other defendants, all of whom were non-residents, to support their pleas to the jurisdiction. The only ground upon which these defendants could have been carried from their counties at all was that they were the indorsers upon a promissory note, the makers of which resided in the county of Houston.

But when it was made to appear, in support of their plea to the jurisdiction, that there had been a former recovery against these makers on that identical note, and that the judgment thereon had not been reversed or set aside, it necessarily followed that the right of action on that note, as to these principals, had been merged in that judgment, and, as to them, was of no effect. Unless, therefore, a promissory note which was *functus officio* as

to the makers, could give the holder a right of action against *them*, it could not be vitalized by using their names so as to give jurisdiction over other parties who were not liable to suit out of their counties except through them.

Judgment affirmed.

### McLENDON vs. TURNER.

1. Where a perpetual injunction against the enforcement of an execution was proper on a final decree, a temporary restraining order, pending the litigation, to protect property levied on, was not improper,
2. Property acquired by the bankrupt since his adjudication, is not subject to a judgment rendered before, even though it may never have been proven in the bankrupt court.

Injunction. Judgment. Bankrupt. Before Judge CRISP. Macon Superior Court. May Term, 1880.

Reported in the opinion.

HINTON & MATHEWS; J. W. HAYGOOD; W. H. FISH;  
W. S. WALLACE, for plaintiff in error.

HALL & SON; J. M. DUPREE, for defendant.

HAWKINS, Justice.

In 1861, J. B. Ross, as surviving partner, obtained a judgment in Macon superior court against Samuel Turner, as principal, and M. W. McLendon, indorser.

In 1868, Turner was adjudged a bankrupt, and discharged in 1870. In 1874, McLendon paid the *fi. fa.*, as indorser, and took control of it to reimburse himself from his principal. In 1879, he caused the *fi. fa.* to be levied on real estate of Turner, which he had acquired with the use of means received after his adjudication as a bankrupt. The



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McLendon vs. Turner.

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day before the sale, Turner filed an affidavit of illegality to said *fi. fa.*, upon the ground that his acquisitions after he was declared a bankrupt were not subject to sale under the lien of the judgment obtained in 1861. The sheriff refused, on the day of sale, to accept the illegality, and sold the land, McLendon becoming the purchaser; whereupon Turner filed his bill on the equity side of the court, alleging the foregoing and also the pendency of a garnishment in the courts, praying an injunction restraining the sheriff and McLendon from dispossessing him under said sale, and also the cancellation of the sheriff's deed. The chancellor granted an injunction at chambers. McLendon, by writ of error, brought the decision granting the injunction to this court, and here, by a dismissal of the cause, the decision of the judge in granting the injunction was affirmed.

At the regular term of Macon superior court the cause was finally tried by the court, without a jury, on agreement of the parties, and a final decree was rendered for the delivering up and cancellation of the sheriff's deed, with a perpetual injunction to protect the possession of Turner. The bill of exceptions now here complains of this decree, and asks its reversal principally upon two grounds—the first, that the complainant had a complete remedy at law, McLendon being solvent and able to respond to all recoverable damages; also, upon the ground that the property was subject to the lien of the judgment, the same being anterior to the bankrupt law and the adjudication aforesaid.

1. Whether the chancellor exercised a wise discretion in granting the interlocutory injunction is not now before us, and we therefore do not say more than, whether it was wise or not, McLendon has had that question decided by this court in the legal affirmance of the decision of the judge in granting the same. If upon the final trial it was proper to decree the cancellation of the sheriff's deed, it was but a part of the decree to protect the prop-

erty from all interference by the judgment and *fi. fa.*, the foundation of the deed and sale had thereunder.

Therefore a decision of the other question is invoked, and its determination will be a solution of the propriety of the final injunction.

2. It was contended here that the decision of this court in *Bush vs. Lester et al., administrators*, 55 Ga., 579, and the cases there cited, control this case and compel the reversal of the decree rendered below.

It was held there that a judgment lien obtained before 1868, not proved in the bankrupt court, was preserved, and binding on all the property of the bankrupt, and that the act of congress of 1873, amendatory of the bankrupt act of 1867, did not relieve the property from such lien.

In that and all the other cases in our reports, the lien of the judgment was held to be binding on all the property of the bankrupt owned by him at the date of his adjudication.

The owner of the judgment remained without the bankrupt court, waiving all benefits to participate in the distribution of the bankrupt's estate as a creditor, and relying entirely upon the lien of his judgment as impregnable to infringement by either the bankrupt law or state legislation.

These decisions of this court have been made, and whilst we abide the same, and have the highest regard for the pronounced judgments of this court, we are not disposed to extend the principles there announced beyond the class of cases covered by it. No debtor seeks a bankrupt court to provide for future misfortune, indiscretion in business, or to prevent the payment of future indebtedness, but to provide against the financial vortex occasioned by misfortune in the then past.

The case at bar is different; here the judgment creditor seeks not only to bind all the property of the bankrupt held at the time he was so adjudged, but to extend it to all future acquisitions. This is not in accord with

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the spirit and object of the system of bankruptcy, not the rest and security the law intended to give the burdened debtor and his helpless family—but in consideration that he would surrender all and every part of his estate to satisfy judgment liens, and all but the exemptions allowed by law, to his general creditors, he should be regarded as *civiliter mortuus*, his debts all discharged and his future earnings preserved to himself and family, free from all liens, mortgages and incumbrances created by contract or law before his adjudication. Accordingly, the lien of this judgment is preserved as against all the property of the bankrupt, including the exemptions. The debt from being one by note has become a debt of record and is discharged, but the inviolability of the lien is preserved upon all the estate and property held at the time of his being declared a bankrupt. But the decisions are uniform, so far as we have been able to find, that the acquisitions of the bankrupt, by means acquired or made after his bankruptcy are free from the existing debts and relieved from all liens, mortgages, etc. See 64 Penn., 84.

Judgment affirmed.

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FREEMAN, executor, vs. BIGHAM.

1. The evidence is conflicting, and a new trial will not be awarded on the ground that the verdict is contrary thereto.
2. While one party to a cause of action may testify as to a contract between himself and the agent of the other within the scope of the latter's agency, although the principal be dead, the agent being alive and able to confront him, yet he may not testify to mere statements of the deceased repeated to him by the agent touching a past contract between the principals.  
(a). Nor does it alter the case that the agent subsequently became the executor of the deceased and a party to the suit. He was not a party to the contract.
3. The contract between the indorser and payee of a promissory note is distinct from that between the payee and the maker. Therefore in a contest between the indorser and payee, which could not in any

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way affect the liability of the maker, he was not rendered an incompetent witness by the death of the payee.

4. Where one indorsed a promissory note, to be liable in the second instance, and subsequently became the attorney of the holder in endeavoring to secure payment from the maker, and in a suit on his indorsement pleaded a release from liability, letters from him to his client which were otherwise admissible, were not rendered inadmissible, by the fact that they related to an effort to effect a compromise between the client and the principal debtor. To exclude them as relating to a compromise it must be one in which the writer was interested.
5. The relation of attorney and client is eminently one of trust and confidence. Where the attorney to collect a debt from the principal debtor was himself liable in the second instance, the statute of limitations as to his liability ran from the time when the debt could not be collected from the principal, and when the liability of the attorney was made apparent to the client.
  - (a). While the client was bound to ordinary diligence to discover the insolvency of the principal debtor, he was entitled to the diligence, knowledge and advice of his attorney on that subject.
  - (b). The testimony stated in the second head-note was inadmissible for the further reason that it tended to show the *bona fides* of the witness in his relation as attorney for the deceased.
6. A letter written by one party to a suit for the purpose of effecting a compromise with the other, is not admissible in evidence.
7. The published volumes of supreme court reports do not furnish the highest evidence of the judgment of affirmance or reversal in a particular case. The *remittitur* is the best evidence thereof.
8. We find no material error in this case other than those specified above.

New Trial. Witness. Evidence. Attorney and client. Charge of Court. Before Judge BUCHANAN. Troup Superior Court. May Term, 1880.

Sterling, principal, and Sims, security made a promissory note to Neal or bearer, for \$10,466.66, dated May 19th, 1860, due on January 1st, 1861. This note was indorsed as follows: "Indorsed the second instance only, and this note to be sued when due, without any delay, if not promptly paid. (Signed) Benj. H. Bigham." There were several credits not material here. Freeman, as exe-

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cutor of Neal, brought suit on this indorsement, alleging the insolvency of the maker and security; that when the note fell due and was not paid, Bigham had due notice; that at his request, he being an attorney at law, and to enable him to protect his interest, the note was placed in his hands for collection; that he obtained judgment but failed to make the money, and allowed property of the defendant, Sterling, to be sold without any diligence in subjecting it; that Sterling became a bankrupt and Sims died insolvent; that the last piece of property from which any money could be realized was levied on in 1867, and collusively allowed to stand until 1873, when a claim was interposed by J. R. Sterling, which is still pending, but that there are older *fi. fas.* which will absorb all of the fund, if subjected, so that there is no probability of realizing anything therefrom.

The defendant raised two principal issues: first, that in consideration of his legal services in pressing the note against the principal and surety, he was released from his liability; and second, the statute of limitations.

The evidence was very conflicting. The jury found for the defendant on both pleas. Plaintiff moved for a new trial on the following, among other grounds:

(1). Because the verdict was contrary to law and evidence.

(2). Because the court erred in allowing Bigham to testify as follows:

"Freeman brought the note to me, to my office, early in June, 1861, for suit. After I had written the ordinary receipt for collection, Freeman reminded me of a contract I had made with Mr. Neal as to suing the note to judgment for the release of my liability as indorser, and requested me to add the words, 'I having agreed to sue the same without charge for professional services,' as he would like to have the receipt in accordance with Mr. Neal's instructions."

Plaintiff's counsel insisting, (1), that said testimony was

parol to vary the terms of the receipt; (2), that it was the declaration of an agent not within the scope of his agency; that it was permitting the declarations of the deceased James Neal to be given in evidence by the defendant, the other party to the contract, in his own favor.

(3.) Because the court allowed Sterling, the maker of the note, to testify as to the contract between Neal and defendant, Neal being dead.

(4.) Because the court admitted in evidence letters which passed between Neal and Bigham, and Freeman and Bigham, concerning an effort to compromise the debt against Sterling.

(5.) Because the court refused to admit a letter from Bigham to Freeman which related to an amicable settlement or compromise between them of the present claim.

(6.) Because the court refused to admit in evidence the 54th *Ga.*, pages 690-4.

(7.) Because the court refused to continue the case, or to pass it until the determination of the claim case mentioned in the declaration.

(8.) Because the court charged that if Bigham became the judge of the superior court, the relation of attorney and client ceased while he was on the bench. (The evidence disclosed the fact that he had been on the bench.)

The motion was overruled, and plaintiff excepted.

STEWART & HALL; D. N. SPEER; HOWARD VAN EPPS; JAS. S. WALKER, for plaintiff in error, cited as follows: On admission of letters, Code, §3789; 10 Barr., 164; 48 *Ga.*, 642; 13 *Ib.*, 414. On rejection of letter, 49 N. Y., 321; 6 *Ga.*, 213. On competency of witness, Code, §3854; 51 *Ga.*, 624; *Stanford vs. Murphy*, (September term, 1879); 57 *Ga.*, 232; 60 *Ib.*, 535; 24 *Ib.*, 211; 32 *Ib.*, 72; 49 N. Y., 555; Story on Agency, 150; 58 *Ga.*, 494, 288; 60 *Ib.*, 535; 37 *Ib.*, 118; 50 *Ib.*, 203; 61 *Ib.*, 147; 44 *Ib.*, 46, 58; 2 B. & A., 647, and notes.

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FERRELL & LONGLEY; A. H. COX; T. H. WHITAKER; C. W. MABRY, for defendant, cited, on Sterling's testimony, 30 *Ga.*, 939; 19 *Ib.*, 203; 29 *Ib.*, 294; 18 *Ib.*, 746; 8 *Ib.*, 461, 462; 36 *Ib.*, 520; 45 *Ib.*, 147; 56 *Ib.*, 638; 1 Kelly 12; Code, §3806; 2 Gr. Ev., 519, 523. On admission of letters, 1 Greenleaf on Ev., §§192, 201; 1 Starkie on Ev., §158; 59 *Ga.*, 52; 13 *Ib.*, 406; 56 *Ib.*, 557; 41 *Ib.*, 186. On Bigham's testimony, 58 *Ga.*, 494; 56 *Ib.*, 639; 40 *Ib.*, 193; 58 *Ib.*, 479; 61 *Ib.*, 147; Code, §3803, 3804; 30 *Ga.*, 164; 59 *Ib.*, 562; 54 *Ib.*, 527; 53 *Ib.*, 286; Code, §2196; 12 *Ga.*, 170; Story on Agency, 58; 61 *Ga.*, 149; 60 *Ib.*, 498; 61 *Ib.*, 660. On charge concerning duty as attorney, 56 *Ga.*, 685; 4 Conn., 527; 1 Penn. St., 395. Cessation of relation of attorney while on the bench, 23 *Ga.*, 175.

JACKSON, Chief Justice.

This action was brought by Freeman, executor of Neal, against Bigham, on an indorsement of a promissory note whereby the indorser limited his liability in the following words; "Indorsed second instance only, and this note to be sued when due, without any delay, if not promptly paid."

The defendant pleaded the statute of limitations and a release by the plaintiff's testator in consideration that he, the defendant, being an attorney at law, would sue the note to judgment without charging any fee therefor. The case went to trial on these issues, and the jury found a verdict for the defendant on such plea; whereupon the plaintiff made a motion for a new trial on numerous grounds therein set out, and found in the report of the case.

1. The testimony is sufficient to support a verdict on each plea on either side, in our view of it, and must stand unless, in the ruling of the court on the testimony or in the charge to the jury, there be such error as requires the case to be sent back for a trial *de novo*.

On a careful examination of this voluminous record, we conclude that the case is very close on the facts. Witnesses testify to statements of the parties which are at variance with each other, and cannot all be made to consist with truth. The vast number of letters introduced are also capable of two constructions, and inferences and arguments may be drawn from some favoring the theory of the plaintiff, and from others sustaining the pleas of defendant.

2. The plea of the statute of limitations was first filed, and some term or two thereafter the release was pleaded. It is unfortunate that the parties could not both have been heard, and brought face to face with each other on the real merits of the controversy; but the voice of one has been hushed in death, and the rule of law, as of justice, will not suffer the other to be heard in respect to any contract or conversation which passed between the two, and had reference to the cause of action and the issue between them. Anybody else may tell all that both said when together, or that either said against his interest. But death having silenced one, the law silences the other on the great principle that equality is equity.

We think that on the issue of the release, this principle was violated in permitting the defendant to swear in respect to a message which he testified that Mr. Freeman delivered to him from the plaintiff. That testimony is set out in the fourteenth ground of the motion, and is as follows: "Freeman brought the note to me, to my office, early in January, 1861, for suit; after I had written the ordinary receipt for collection, Freeman reminded me of a contract I had made with Mr. Neal as to suing the note to judgment for the release of my liability as indorser, and requested me to add the words, 'I having agreed to sue the same without charge for professional services,' as he would like to have the receipt in accordance with Mr. Neal's instructions."

It is true that Freeman was living, and could confront



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and did confront the defendant in reference to this matter denying it *in toto*; but if Neal had been living his voice could have been heard upon it; he might have denied that he gave any such instructions, and thus his testimony might have turned the scale in the minds of the jury, and settled the controversy in respect to the alleged message. It will be seen that the defendant puts in the dead mouth of Neal words spoken to Freeman and communicated to him by Freeman, which, if true, went to the vitals of the issue of release, and established that release beyond peradventure. Thus the principle of the equality of the dead with the living, which we think is the corner stone of our evidence act permitting parties to swear in their own cases, and on which the rulings of this court on the subject of permitting the living man to swear at all when his adversary is dead, is shaken, if not crushed, by this ruling on this point. There may be opinions of this court which approximate the ruling here, but none which sustain it. Of any contract within the scope of his authority which Freeman made as agent of the deceased, Bigham was competent to give his version, because Freeman was authorized to confront him, who in such case was empowered to make the contract, and made it for the dead, and who only could know on Neal's side whether it was or was not made. It is not pretended that Freeman as agent made the contract of release. That contract was made by Neal himself, if made, immediately after the indorsement by Bigham, according to defendant's claim; and hence Freeman was only repeating to Bigham what the deceased said touching a past contract between Neal and Bigham made by themselves, and *with which contract* the agent who have the note sued had nothing to do. Bigham might as well be permitted to testify what Neal said to him as to testify what message he sent him by agent. We cannot tell what effect this testimony had on the issue. It may have decided the issue, conflicting and close evidence appears to be. It can make no difference.

principle, that Freeman is Neal's executor, and the party plaintiff, because he is no party to the contract. Neal was that party.

3. Sterling was no party to the indorsement. Essentially it is a separate contract from his own as the maker of the note, and he was competent to testify in regard to all that transpired between Neal and Bigham. He has no interest in the issue. Before, and since the evidence act, he would be competent—before, because he has no interest, having the note to pay, if ever he is able, either to Neal or to Bigham, and to Neal sooner than to Bigham, because Neal has already a judgment against him, and Bigham has none; and since the evidence act, because he is no party to the contract or cause of action, which is the indorsement. And every indorsement is a new contract. 2 Kelly, 158. There seems to be some doubt according to his testimony, whether this contract of release was made before or after the indorsement; if before, it is merged, or ought to have been, in the written contract, and that cannot be varied or added to by anything which was part of the original undertaking; if subsequent, it is a valid, separate agreement for a valuable consideration, to-wit, professional services, which have been performed, and the jury should be fully instructed in respect to the law bearing thereon. The testimony ought to go in, but the jury should be instructed to pass on the question whether this agreement to release the indorser was made before or after the contract of indorsement. If made before, of course it would have been inserted in the writing in the very nature of things; if afterwards, it would not, or at least it need not, have been done.

4. We think that the letters objected to were properly admitted. It is true that they were on the subject of compromise, but compromise of what? Not of Bigham's liability as indorser, but of Sterling's indebtedness as maker. Bigham was the counsel of Neal and advising him of Sterling's situation, and recommending him to

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settle and compromise with Sterling. Perhaps it might be well on another trial for the court to instruct the jury that if in their judgment, on a careful reading of the letters, it appeared that Bigham was interested in the compromise and really moving in his own interest, and attempting to effect it for himself as well as for Sterling, it might be considered in weighing the evidence; but certainly nothing of the kind is so patent in the letters, to us, as to demand their withdrawal from the jury. On the contrary, their tone seems to be that Neal, and Bigham, as counsel, were attempting to compromise with Sterling, the maker and judgment debtor, and what passed between the two on the same side is not obnoxious to the principle that a party shall not be hurt by his adversary for anything he says or writes when trying to buy his peace, and "agree with his adversary quickly while he is in the way."

5. Indeed, in our view of the statute of limitations, these letters are of the utmost importance, and absolutely necessary to elucidate that issue. A confidential relation subsisted between these parties. Bigham was counsel for Neal. After he had sued the makers of this note to judgment, he was employed to prosecute that judgment in execution, and to make the money out of the makers. This devolved on him the duty to advise his client of the status of defendants—the makers' property, of the prospects of collection—of the record evidence of their estate, and of their liability—and his *bona fides* in all this trust confided to him has much to do with the plea of the statute of limitations under the peculiar relations between the two. The issue on the statute, it is true, is distinct from that on the release. If there was a release, the statute is unnecessary. If Bigham is liable in the second instance, did plaintiff sue in six years after this liability was made apparent to him? That is the issue on the statute. The court undoubtedly gave the law correctly as to what proof would be sufficient to show the insol-

vency of the makers and their inability to pay *this judgment debt* ; and that whenever Neal got that evidence of the inability of the makers to pay it, his right of action against the indorser accrued ; but in this case, Bigham occupied a two-fold position. He was attorney and counsel for Neal, and liable to him in the second instance to pay this debt, if he had not been released. He was bound to give all the information he had to his client, touching the prospect of collecting this judgment debt out of his principals, just the same that it involved the time to bring a suit against himself, as if another had been involved as indorser in the second instance, and was to be sued by his client. A trust was devolved upon him, and not a mere naked trust, and that trust required him to communicate the whole pecuniary situation of the makers to Neal or his agent, that action might be taken against the indorser. We do not mean to say or to intimate that this has not been done in this case, but simply to remark that the presiding judge should direct the attention of the jury to the issue whether or not it has been done, in their judgment, under the evidence.

The relation of attorney and client is eminently confidential. It approximates that of guardian and ward, in respect to the superior knowledge of the attorney touching the client's interest, which he is commissioned and paid to watch and to guard. It is that of trustee and *cestui que trust*, and the former must have no personal interest antagonistic to that of the latter ; nor can he so mix the two as not readily to distinguish between them ; if he does, he must suffer rather than his confiding client. If their interests collide, his must yield ; and for this reason, it is dangerous that he assume, or circumstances force him into the double relation of attorney for, and liability in the second instance to, the same person in the same transaction. In one case, this court went so far as to hold that an attorney who was liable as security on the same paper with his principal, and who acted with that

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principal and for him in assisting him to defeat the creditor's claim on the principal by putting that principal in bankruptcy, and otherwise helping him to impede the collection of the debt against the principal, was estopped from setting up his discharge as surety by anything the creditor did or omitted to do towards the principal, whilst the attorney was so helping his principal against the common creditor of both; and therefore the failure of the creditor to prosecute his claim in the bankrupt court where the surety, as attorney, was representing the bankrupt principal, though it might have hurt the surety and increased his risk, would not discharge him. 60 Ga., 52.

That case certainly went far; as the relation of client and attorney did not exist between the creditor and the surety, but between the principal debtor and the surety; but it serves to illustrate the stern, though equitable and beautiful morality with which the exponents of our law, of the same brotherhood, would enrobe the common profession.

(a). The testimony of Bigham to the sayings of Neal communicated by Freeman, improperly admitted, as we have ruled on the issue of the release, also affect this view of the statute of limitations. For if Bigham was released as indorser when he sued the note to judgment against the makers, he did not occupy the double relation of debtor and attorney; but was only the attorney of Neal free from all double motive of action, and every fact, therefore, which tended to show his release, necessarily showed also his *bona fides* and single eye in all his communications to his client.

(b). It is to be observed that the presiding judge, whilst he charges the jury that if the plaintiff, by ordinary diligence, could have discovered the insolvency of the makers more than six years before the action was brought against Bigham, his right of action was barred, yet wholly failed to allude to any obligation on the part of Bigham to use this diligence for Neal, and to communicate what he had

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learned to Neal, though his attention was called thereto by a written request. Neal relied on Bigham for diligence in respect to Sterling's and Sims' condition, for he had employed him to press this execution against them. He lived where they did, and where the deeds were recorded, and it was his duty to apprise Neal, who lived in another county, of their situation. We do not say that these letters do not show that this duty was discharged or was not discharged; but that this issue was not submitted to the jury, as it ought to have been.

6. We cannot say that the letter of the eighth of September, 1876, was admissible. It was written for a compromise between Bigham and Freeman, by the former, after suit, and no expression in it looking to that end should have gone to the jury. The court was right to withhold it.

The case in 54 *Ga.*, was properly ruled as inadmissible to go to the jury.

7. There was no error in refusing to postpone this case until the claim case of Neal *vs.* Sterling had been tried. Nor do we find that there was error in charging that the relation of client and attorney ceased while Judge Bigham was on the bench. And, generally, the record discloses no error, certainly no material error, other than those indicated above.

The judgment is reversed because the court erred in admitting the testimony of Bigham as to the sayings of Neal reported to him by Freeman, as alleged, because Neal was dead; and in failing to charge in respect to the statute of limitations, the obligation on Bigham's part to inquire and communicate the status of the makers of the note to his client, Neal, in modification of the charge which put on Neal the duty to inquire and act to prevent the bar of the statute.

Judgment reversed.

ROBINSON *vs.* VEAL *et al.*

1. Where the court struck a portion of the answer of a defendant to an application for a writ of possession, and he thereupon withdrew the balance, he debarred himself from excepting to such ruling by the court.
2. An exception which turns upon the evidence will not be considered if there is no brief of evidence before this court.

Practice in the Supreme Court. September  
1879.

Veal *et al.* applied for a writ of possession against Robinson, requiring the sheriff to put them in possession of certain land which they alleged they had bought at the sheriff's sale. Robinson answered, setting up irregularities in the levy, etc., and disclaiming title in himself. The court struck all except the disclaimer, and that was all that was drawn. The court then withdrew the case from the docket and after hearing some evidence of plaintiffs (which was not set out in the record nor in the bill of exceptions) ordered the writ to issue. Defendant excepted, and assigned error on both of these rulings.

JOHN A. WIMPY, for plaintiff in error.

W. E. SIMMONS; S. J. WINN, for defendants.

CRAWFORD, Justice.

When this case was called a motion to dismiss was made, upon the ground that no brief of the oral nor of the written testimony accompanied the record and bill of exceptions. To this it was replied that no brief was needed to pass upon the errors assigned, and which were to be insisted upon in the argument.

The assignments of error were upon the ruling of the court on issues formed by the respondent's answer, and were to be tried by a jury; and upon the final jud



of the court after the case had been withdrawn from their consideration. The answer which made the issues for the jury was stricken by the court, except that part of it disclaiming title. This being done, respondent himself withdrew that portion of the answer, and thereby left nothing upon which the jury could pass. The judge then proceeded to hear testimony and to pronounce final judgment upon the movant's petition.

1. We cannot consider any errors which may have been committed whilst the case was before the jury, because after the court had stricken all the answer save one portion thereof, and the respondent then withdrew that, there was an end, by his own act, of the jury trial. Had he stood upon his legal rights under the ruling of the court, he would not have terminated the trial, nor cut himself off from a review of the errors which he claims to have been committed.

2. Neither can the assignment of error upon the final judgment in the case be heard, because the evidence upon which it was rendered is not in the record.

Writ of error dismissed.

#### RICHARDS vs. BUTLER & CARROLL.

1. A charge not warranted by the evidence should not be given.
2. Partners may dissolve *inter sese* by consent, but in order to relieve a retiring partner from liability to one who has dealt, and continues to deal, with the firm on the faith of his being a member, notice of the dissolution is necessary; especially where the firm name remains unchanged.
- (a) Actual notice is required. Therefore, a publication in a paper which does not circulate in the vicinity where the person to be notified resides, without more, would not be sufficient.
3. The verdict is not contrary to law or evidence, except in so far as controlled by the erroneous charge.

Charge of Court. Partnership. Notice. New Trial. Before Judge SPEER. Newton Superior Court. March Term, 1880.



Reported in the decision.

J. J. FLOYD; J. N. GLENN; HOPKINS & GLENN  
plaintiff in error.

CLARK & PACE, for defendants.

HAWKINS, Justice.

Butler & Carroll, on the twenty-first day of August, 1879, brought suit against Ayers & Co., a firm, as alleged, comprised of Lucien Smith, F. M. Ayers and Henry Richards, for the recovery of four hundred twenty-three dollars and sixty-two cents, upon account for the years 1877 and 1878; fifty dollars same being for the year 1877, balance in 1878, and in 1877 was a consignment of merchandise.

To this action, Richards pleaded that he was not partner in said firm in 1878, and that the consigned goods were undisposed of and subject to the order of plaintiffs except a small amount which had been sold and proceeds paid to plaintiffs; balance had not been demanded.

A trial of the cause resulted in a verdict for plaintiffs for the full amount of the account. The defendant moved for a new trial, which was overruled and a writ of error to this court was had, asking a reversal of the decision refusing to grant a new trial upon the grounds taken in the motion.

It appears that in the years 1876-7, F. M. Ayers and Henry Richards were partners in the mercantile business in the town of Conyers, Georgia, under the firm name and style of Ayers & Co.; and on the sixteenth day of January, 1878, the said Richards withdrew from said firm and Lucien Smith was introduced in his stead, and the business was continued under the same name, of Ayers & Co.

Carroll testified that the account was correct and unpaid. The bill made in 1877 was goods sent on consignment to defendants; had received ten dollars on in-

manded pay for the goods, but had never demanded of defendants the goods. The bill of goods was not sold to defendants, but was consigned. The bill made in 1878 was sold to defendants. Defendants, Ayers and Richards, commenced business in Conyers as partners in 1875 or 1876, perhaps in 1877. He knew Richards was connected with it by reason of said goods being consigned to them. Lucien Smith, one of the defendants, told witness, about the first of the year 1878, that he was coming to Conyers to go into business with Ayers & Co.. to-wit: with F. M. Ayers and H. T. Richards, and that Richards was going to give Smith an interest down there. Witness did not think Ayres had much money or property. Richards was a man of property.

L. T. Livingston swore that Ayers and Richards did business as co-partners in Conyers, Georgia, in 1876, 1877, and also 1878, so far as he knew, he traded with said firm—bought goods from them, etc.—and knew Richards was a partner; frequently saw Richards in and about the store of Ayres & Co. in the above named years. Richards is a man of means; had relatives and owned property in Conyers. The sign of Ayers & Co. was over the door in the above named years, and is there now, so far as witness knows. Witness saw Richards hauling goods from the store of Ayers & Co. in 1879. Said goods were sold at sheriff's sale as goods of said firm.

Defendant, Richards, swore that he and Ayers commenced business in Conyers, Georgia, as partners, in the spring of 1877; that the business was carried on under the name of Ayers & Co. On the sixteenth day of January, 1878, witness and Ayers dissolved copartnership and settled up their business; that Lucien Smith then went in said house with Ayers as partner, and Ayers and Smith carried on the business, as far as witness knows, under the firm name of Ayers & Co., at the same place. After witness and Ayers so dissolved, he never in any way had any interest after that time with said firm;

received none of the profits, nor was he to receive nor was he to be in any way responsible for debts or losses. The business was carried on in the name of Ayers & Co. by Ayers and Smith and in the name, Ayers & Co., against witness' objections. Smith Carroll, one of the plaintiffs, the first of the year 1878, February or March, or perhaps January, and informed that he, witness, was not a member of the firm of Ayers & Co. That after the dissolution he sold the goods to Smith and took a mortgage to secure payment. Witness resided in Newton county, was frequently with Conyers looking after his real estate and visiting his daughter who lived there, and in 1878, his grandfather, Mrs. Jennie Sweet lived in Conyers—he never had any trading with plaintiffs nor did the firm. On the dissolution in January, 1878, witness and Ayers divided the profits. The goods fell to witness, as he had furnished the capital. He loaned money to Ayers & Smith and goods at divers times; he informed Carroll, by the tenor of conversation, of his withdrawal from the firm. He had no connection with the firm after the sixteenth day of January, 1878, and Carroll admitted the fact.

Witness also stated he had never published any notice of his dissolution with Ayers.

Lucien Smith testified that he and Ayers formed a partnership on the sixteenth day of January, 1878, in Conyers, Georgia, and carried on business there at the same place. Ayers & Co. had used previously; witness bought out Ayers' shares and gave his note, and after that Richards had no connection in any way with Ayers & Co. Witness was brother of Mrs. Butler, and did business for plaintiffs from 1876, down to May 1st, 1878, when he came to Conyers to do business, and remained in partnership with Ayers until the first of the year 1879. He told one of the plaintiffs that he was going to be one of the firm of Ayers & Co. and bought out Richards' interest—and from what he

the plaintiffs they knew that Richards was out of the firm, and that witness had taken his place; also produced the card published in the Conyers *Examiner*, showing the advertisement of the firm of Ayers & Co., with the names of Ayers & Smith on the same.

The *Examiner* was a paper published in Conyers, with considerable circulation in and out of the county of Rockdale—plaintiffs did business in the city of Atlanta—the new firm was insolvent and failed the first of 1879, and stopped business.

Carroll denied that he or the firm had any notice of the withdrawal of Richards from the firm of Ayers & Co.—he had no knowledge of his withdrawal until the present troubles about collecting their money—also that Smith never so told him or the firm, but on the contrary, said he was going into business with Ayers & Richards.

Neither Ayers nor Smith had any property. Richards was a man of money, and they sold the goods on the faith of Richards' pecuniary responsibility.

The court charged the jury upon the facts, that if a part of the account was a consignment to Ayers & Co. at the time Richards was a partner of the firm, and the defendants have not paid for the goods so consigned, and a reasonable time has elapsed to dispose of the goods, and no offer or tender has been made to return said goods to the consignors, and if you believe said firm is insolvent and ceased business, the defendants are liable if demand for payment has been made for the market value of said goods with interest.

The court further charged, that if Richards was at any time in 1877, a member of the firm of Ayers & Co., then the law will presume that partnership to continue until a dissolution is shown, with notice thereof. According to the rules of law, a partnership may be dissolved by mutual consent, but such dissolution does not affect the world or creditors, unless the parties do something more. If Richards was a member of the firm of Ayers & Co.,

and so known to plaintiffs, and during the admitted continuance of the partnership, said firm had dealings with these plaintiffs, then, whenever said firm dissolved, it was the duty of said firm or a member thereof to give notice of such dissolution to those with whom they had previous dealings—and if upon failure to give notice, and plaintiffs not knowing that Richards had withdrawn, sold goods to said Ayers & Co. on the faith that he, Richards, was still a member, then Richards would be liable as a partner to plaintiffs.

A mere notice in the *Conyers Examiner*, without more, would not be sufficient.

The errors complained of here are to the foregoing charges, and the decision of the court below in refusing the new trial asked, must be controlled by the questions presented in the aforesaid charges.

1. We think the court erred in the charge as to the consigned goods. After a careful examination of the evidence in this record, we are not able to find evidence that a demand was made upon the defendants, Ayers & Co., as composed in the year 1877, when the goods were consigned, nor does it appear that a demand was made upon any person or firm prior to the commencement of the suit, or that the defendants Ayers or Richards made such disposition of said goods as to dispense with a demand. A right of action on the part of the consignor could not exist in the absence of such demand or use before the bringing of the suit.

2. As to the second and main point relied on here, we think the court committed no material error. It is true that a partnership is dissolved by the withdrawal of one of its members or by the introduction of a new partner. In both cases the partnership ceases in all of its characteristics of agency. The withdrawal of a member ends one and the introduction of another creates a new firm, but as to the customers or dealers with the old firm, the mere withdrawal, without more, will not protect the retir-

ing member from liability to a creditor, who had dealt with the firm and who, without notice, had sold goods on the faith of the continued responsibility of the firm.

No such dissolution of a partnership, without notice, would protect the retiring member, especially where the new firm continued the business in the name of the old firm.

What notice is requisite and the manner of giving it, must depend upon the business relations of the creditor and debtor, and the firm name under which the business continues. As to one who had been dealing with the firm, nothing less than actual notice of the withdrawal communicated to the plaintiffs would be sufficient. The publication in a newspaper not shown to circulate in the vicinity of the creditor, or read by him, would not suffice. The creditor must be informed in a reasonable way, and where the retiring partner permits the new firm to carry on the business under the same name, the inference is but fair that, by allowing the use of the same name to be continued, he intends to give the firm with the public the benefit of his responsibility. To the extent, therefore, that these persons were induced to trust the firm on the fact that he was still a member, he ought, upon principles of good faith, to be estopped from denying the fact. His consent to such use of the same name was, in effect, a continuing representation to those ignorant of the dissolution, that the firm was the same.

Whether the notice was sufficient, and apprised the plaintiffs of the withdrawal from the firm, was a question of fact to be passed upon the jury.

3. The evidence was conflicting, and the court committed no error in refusing the new trial on that ground.

Judgment of the court reversed, unless the plaintiffs in the court below will write off the amount of the consigned goods with the interest thereon, and in that event the judgment is affirmed.

See 26 Ohio, 589; 1 Parsons on Part., 412.

Judgment reversed on terms.



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Sapp vs. Adams, superintendent.

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SAPP vs. ADAMS, superintendent.

1. There being no judgment in the record, and it appearing from the bill of exceptions that such a judgment had been rendered, the decision in this case was delayed, and the clerk was required to certify and send up a copy thereof, under the act of 1877.
2. The judge of the superior court should not render a judgment finally disposing of a case before him on a *certiorari*, where issues of fact are involved, but should remand the case for a new trial.

Practice in the Supreme Court. Practice in the Superior Court. *Certiorari*. Before Judge MERSHON. Dodge Superior Court. May Term, 1880.

Sapp brought suit against Adams, superintendent of the Macon & Brunswick Railroad, in a justice court, for damages to a horse, resulting from failure to keep a crossing in proper repair. The case involved disputed questions of fact. The justice rendered judgment for the plaintiff for \$50.00 and costs. Defendant sued out a *certiorari*. The judge rendered a judgment reversing the decision of the justice and finally disposing of the case. Plaintiff excepted.

L. A. HALL; J. F. DELACY, for plaintiff in error.

No appearance for defendant.

JACKSON, Chief Justice.



No final judgment of any sort was in the transcript of the record, and the writ of error would have been dismissed but for the act of 1877 which required this court, as we construe that act, to direct the clerk of the superior court to certify and send it up if of record below. It was accordingly transmitted and certified by the clerk to have been of record, and we now proceed to determine the cause on its merits.

The sole point made by the bill of exceptions and assigned as error, is that the court made a final disposition

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The Northeastern Railroad Company *vs.* Barrett *et al.*, executors.

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of the *certiorari*, instead of sending it back to be again tried in the justice court. The superior court may finally dispose of the cause from a justice court brought before it by *certiorari* only when the questions made are pure issues of law and no disputed facts are involved. Code, §4067; 55 *Ga.*, 315. On examining this record, we find that the facts were much disputed in respect to the bridge over the railway, whether it had been repaired or not by the company, and when, and in respect to the crossing, whether it had been established by law as a private way by use for more than seven years. The liability of the railroad company turned on these matters of fact, it would seem from §4067 of the Code, and also the amount of plaintiff's damages depended on whether or not the defendant and plaintiff were both negligent, the one in not repairing the bridge and the other in crossing over it, when a good bridge over a public road was not very far out of his way, thus involving the doctrine of contributory negligence. These were issues of fact, which the court was not empowered finally to dispose of, and the final judgment must therefore be reversed.

Judgment reversed.

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THE NORTHEASTERN RAILROAD COMPANY *vs.* BARRETT  
*et al.*, executors.

Injunction will not be granted to restrain an action at law where the grounds urged therefor can as readily be set up as a defense to such action. To warrant interference by injunction, it must appear that the remedy at law is not complete. The concurrent jurisdiction of courts of law and equity has been greatly enlarged, and the court first taking jurisdiction will retain it, unless some good reason can be given for the interference of the other.

Injunction. Equity. Courts. Before Judge POTTLE.  
Clarke Superior Court. May Term, 1880.

Reported in the decision.



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The Northeastern Railroad Company *vs.* Barrett *et al.*, executors.

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A. L. MITCHELL ; L. & H. COBB, for plaintiff in error

POPE BARROW ; GEO. D. THOMAS, for defendants.

CRAWFORD, Justice.

This was a bill filed by the Northeastern Railroad Company to enjoin a common law action of ejectment brought by Barrett and Ware, to recover certain land which the said company has now in possession, and to which they, as the executors of Edward R. Ware, claim title.

The defendants filed a demurrer to the bill, and after argument had thereon, the same was sustained by the court, and complainants excepted. The grounds of the demurrer were :

1. An adequate and complete remedy at law.
2. There was no equity in the bill.
3. The property was taken without due process of law.

The real questions of dispute between these parties, and out of which this litigation arises, are the *measure of damages, and the time when they are to be assessed*. The grounds of equity are, that by the consent of Ware, the owner of the land, they entered and constructed their road bed upon it, and made heavy expenditures in other improvements necessary to their use and enjoyment. They were always assured by Ware that they should have the land at its value, and at one time they had reason to believe that he would make a donation of the same to the company. And upon the further grounds of the wants of the community, commerce and general public interests.

We see no reason why all these matters may not be set up by proper pleas at common law, and the whole litigation there disposed of, without resorting to the harsh remedy of injunction and a suit in equity. If by the bill it was shown that this company could not be as fully and completely protected at law as in equity, then the bill would be sustained and the injunction granted.

The Merchants' & Planters' National Bank *et al.* vs. The Trustees of the Masonic Hall.

The concurrent jurisdiction of the two courts has been greatly enlarged, and the court first taking therefore will retain it unless a good reason can be given for the interference of the other. None appearing by this bill, the judgment of the court below must be affirmed. Were we to hold otherwise, we should disregard numerous decisions pronounced by this court, some of which may be found in 60 *Ga.*, 594; 43 *Ib.*, 161, 327; 37 *Ib.*, 364.

Judgment affirmed.

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THE MERCHANTS' AND PLANTERS' NATIONAL BANK  
*et al.* vs. THE TRUSTEES OF THE MASONIC HALL.

1. Under §4181 of the Code, which provides that "No supplemental bill need be filed in this state. All such matter shall be allowed by way of amendment. If new parties are necessary by reason of any matter thus set up in the answer, or by way of amendment, the court shall give such direction to the cause to secure a hearing to such parties as if a cross-bill or a supplemental bill had been filed," there was no error in allowing the amendment.
  - (a). Where a creditor has obtained execution against a bank which has been returned unsatisfied, an amendment to a pending bill against the bank to reach equitable assets, which sought to require the president to account for assets in his hands so far as to pay the debt, was not without equity, and was properly supplemental to the original bill against the bank.
  - (b). Where a national bank goes into voluntary liquidation, thus severing its connection with the United States government, it becomes subject to like proceedings as domestic corporations, and if its president had and held a fund liable to the payment of debts, a court of equity, at the instance of a creditor, could reach and appropriate the same to the payment of an outstanding judgment.
2. That the secretary of the complainant committed a felony in hypothecating the bonds to the bank, for the conversion of which the judgment against the latter was obtained, did not necessitate a prosecution on the criminal side of the court as a condition of maintaining the bill. That question was concluded by the judgment in the trover suit. But if not, the rule would be entirely inapplicable to the questions made by this bill between complainant and the bank or its president.

The Merchants' & Planters' National Bank *et al.* vs. The Trustees of the M

3. A proper amendment does not postpone, at law or in equity, the trial term of the cause. The matter of giving time or of postponing rests in the discretion of the court.
4. The reference of such a case as this to an auditor would be fruitless and manifestly improper. It involved no question of account between the litigants.
5. Discovery may be properly waived by amendment at any time before answer filed.
6. There was no error in the charge of the court. It was a correct and able exposition of the law governing the case.
7. The verdict under the law and the evidence could not be other than what it was.
8. It does not sufficiently appear that the motive of plaintiff in appealing to this court was delay only, to authorize that a new trial should be awarded.

Equity. Amendment. Banks. Tort. Felony. Practice in the Superior Court. Auditor. Discovery. Error. Appeal of Court. New Trial. Practice in the Supreme Court. Damages. Before Judge POTTLE. Richmond Superior Court. October Term, 1879.

Reported in the opinion.

BARNES & CUMMING; W. W. MONTGOMERY, for plaintiffs in error.

J. S. & W. T. DAVIDSON; J. GANAHL; HOOK & CO. for defendants.

HAWKINS, Justice.

This was a bill filed by the Trustees of the Merchants' & Planters' National Bank, in Richmond superior court, against the Merchants' & Planters' National Bank and Thomas T. Braley, president, and John T. Newberry, cashier, to recover the sum of eight thousand two hundred and fifty dollars for the appointment of a receiver, upon a judgment rendered by the Masters in 1878, against said bank, as obtained in a trover suit upon which a *fi. fa.* had been issued for the return of *nulla bona* made. The bill charged that t

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*The Merchants' & Planters' National Bank et al. vs The Trustees of the Masonic Hall.*

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was indebted on said judgment; that the secretary and treasurer of the Masons, having in charge some nine thousand dollars in bonds belonging to said trustees, borrowed money from the Merchants' and Planters' National Bank on his individual account, and hypothecated said bonds as collateral security. He failed to meet his notes and the bank sold the bonds. The trustees sued the bank in trover and recovered as above. The bank had, on the twenty-second day of March, 1875, gone into voluntary liquidation, as provided in the national banking act.

On April 5th, 1875, at a meeting of the board of directors, and perhaps the last meeting ever held, the following resolution was adopted: "*Resolved*, That the president be instructed to pay a dividend on the capital stock, as fast as the assets are realized upon, at such times and in such amounts as in his judgment may be deemed desirable." The trover suit was begun in January, 1876. The president, Branch, paid out before the judgment, and after the suit was instituted, more than enough to pay the judgment, and after judgment, about six hundred dollars in money and debts due by stockholders to the bank for borrowed money, in the way of allowing them dividends, to an amount more than sufficient to pay the judgment. And after the judgment receipts were passed covering all debts so set off, whether before or after the judgment, and in the receipts the debts were treated as cash only, so far as appears in said receipts, one of which reads:

"Augusta, July 15th, 1878. Received from bank a statement in full of all my interest in ——— shares of the stock of said bank, which I have this day transferred back to the bank in final cancellation and settlement thereof."

Signed by the stockholder, first filling blank with the number of shares held by him.

There is no evidence that any money was loaned to stockholders after the judgment, nor does it appear when debts owed by the stockholders were created, the presumption being that it was prior to the time the bank went into

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*The Merchants' & Planters' National Bank et al. vs. The Trustees of the Masonic Hall*

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voluntary liquidation, March 22d, 1875, as the bank then ceased to do business.

Branch was its president—managed the whole business, he and his relatives and family owned a large majority of the stock, and he conducted its business the same as if it had been his own private concern; defended the trover suit and the bill applying for receiver, and had both carried to supreme court, and after affirmance refused to pay the debt, and otherwise delayed the Masons in the collection of their money.

The receiver appointed obtained no assets of the bank, and the complainants having the judgment with return of no property, a receiver with no assets, sought by an amendment of their bill to seek satisfaction by a decree against the personal liability of Branch, the president, and Newberry, alleging the conversion of the assets of the bank, and the misappropriation as trustees to their own use, as supplementary to the allegations in the original bill, which amendment was allowed by the court on the eighth day of October, 1879, to which, and the original bill as amended, the bank demurred. The bill was also amended by waiving all discovery but not waiving answer.

The bank demurred to the amendment on the ground, among others, that the same introduced a new cause of action. The demurrer was overruled and the defendant then, for the first time, filed an answer.

The evidence in the case showed that Branch was the controlling spirit of the corporation, owned a controlling interest, used and managed the same as suited his wish, keeping back from the stockholders a part of their dividends, saying he did so to meet the judgment of the Masons. There was no effort to reach the personal liability of the stockholders according to the charter provisions.

On the trial of the cause the jury found a verdict for the Masons against Branch for the full amount, without decreeing as to the receiver or injunction. He made a motion for a new trial, which was overruled, and he now

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The Merchants' & Planters' National Bank *et al.* vs. The Trustees of the Masonic Hall.

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asks a reversal of the court below in refusing said new trial.

1. The first ground of error is the action of the court in allowing the amendment. Upon an examination of the original bill and the amendment allowed, we think the court committed no error in allowing the same.

The original bill charged that the bank, when it went into liquidation, March 22d, 1875, had, besides its capital stock of two hundred thousand dollars, a surplus of over sixty thousand dollars, and that it had assets sufficient to pay all debts, return to the stockholders their stock, and a premium of thirty dollars a share. That Branch was the owner and controller of a majority of the stock, and run the bank as though it was his individual bank, and not a corporation. "That nothing was done without his sanction, and nothing could be done without his approval, and that his control was so great that the bank and Branch had become convertible terms." That the bank, having severed its connection with the United States, the assets became a trust fund in the hands of Branch and Newberry for distribution among creditors and stockholders. That they had violated this trust, and had appropriated large sums of money to their own use and far more than sufficient to pay complainants' debt. That Branch, in settling with stockholders, only paid them par for their stock, telling them he could not pay more on account of the Masonic suit. That Branch, having no intention of ever paying complainants', remarked, after judgment, "the Masons have a verdict; I want to see how they will get their money. I think the verdict amounts to legal robbery." The bill also alleges the efforts of complainants to have the comptroller of the currency appoint a receiver for the bank, and his refusal. It prays for discovery, injunction, receiver, and under certain conditions, for relief vs. stockholders, for subpœna, "and that such other and further relief may be had and given to your orators as the case may require, and as may seem meet and proper."

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The amendment filed October 8th, 1879, simply specifically charges Branch and Newberry, as trustees, in the winding up of the affairs of the bank, and sets out specifically the dates and amounts paid out in fraud of complainants' debt, charging the payment of over fifty thousand dollars since the beginning of the trover suit, and the payment of a sum sufficient to pay complainants' debt, paid to Branch himself, on July 15th, 1868, thirty days after actual judgment *vs.* the bank. It charges litigiousness upon Branch and Newberry, and bad faith. The amendment prays in *terms* for a personal decree *vs.* Branch and Newberry for the debt, and for the expenses of litigation, and for general relief. Thus it will be seen that the amendment simply sets out in detail the facts alleged in general terms in the original bill.

Code, §4181, provides in part as follows: "No supplemental bill need be filed in this state. All such matter shall be allowed by way of amendment. If new parties are necessary by reason of any matter thus set up in the answer or by way of amendment, the court shall give such direction to the cause to secure a hearing to such parties as if a cross or supplemental bill had been filed," and seems to cover this point.

Besides, it seems to us that if the allegations in the bill are true, the creditors of the bank could compel Branch to account for the assets so far as to pay their debts, for all the assets and property of the bank in the hands of its stockholders or president, or elsewhere, is but a trust fund to pay the debts and liabilities of the corporation, and the bank having gone into voluntary liquidation, and ceased its connection with the government of the United States, was subject to like proceedings as domestic corporations or natural persons, and if its president had and held a fund liable to the payment of debts a court of equity, at the instance of a creditor, could reach and appropriate such assets in payment of a debt of the bank.

The second error, that the court sustained a demurrer to the plea, we think is entirely untenable.

The plea was, that inasmuch as the secretary and treasurer of the Masons, in disposing of the bonds to the bank, committed a felony, the Masons could not maintain this action, without prosecuting on the criminal side of the court, or showing some good reason why. The court below ruled, and we think correctly, that the judgment in the trover suit was a conclusion both upon the bank and Branch. Moreover, the plea would be bad in this controversy between the Masons and Branch.

If Branch had been guilty of a felony in the conversion of the bonds and the suit was against him, then there might be some ground to require a prosecution before suit; but this is a controversy with the secretary of the Masons. We hardly think if A steals the horse of B and trades him to C, that B would be required to prosecute A before he could recover in trover his horse from C.

3. The plaintiff in error also insists that when the amendment was filed it was a new case, and that the then pending term was the appearance term, so far as the amendment was concerned, and they could not be held to trial then, and the court erred in not so holding. We are not aware of any rule in law or equity trials, where a proper amendment to the pleadings operates to postpone the trial term of the pending cause; but the court, in the exercise of a wise discretion, will give time, or continue the cause when material amendments are made, and the party is put, by surprise or otherwise, to disadvantage, and when substantial justice requires such postponement.

4. The court refused to refer the case to an auditor, on motion of the bank, to ascertain the assets of the bank. The receiver appointed by the law had failed to find any assets or property of the bank, and it was probable an auditor would have been equally as unsuccessful. There was no complicated account between the parties. The Masons had a fixed amount adjudged in the lower court



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and confirmed here. The assets of the bank, if any, were at the control of the defendants, and aside from that the Masons were asking, on the equity set out in their bill, a decree for a specific sum.

So we think the court was right in refusing to refer the case to an auditor. We think also the certificate from the comptroller of the currency was admissible as evidence under the proof, and if error it was quite immaterial to the issue on trial.

5. The defendant offered his answer as evidence because the plaintiff had, by amendment, waived discovery, and had not so done in the original bill. It appears that at the time the amendment was made in which discovery was waived, there had been no answer, plea or demurrer, and counsel had no intimation of what any answer would contain, or whether and what answer defendants would make. We think, therefore, it was competent for the complainants to waive discovery in the amendment, and the defendants could not use their answer as evidence, under the rules in equity.

6. The charge of the court is a full and able exposition of the law governing the case, and the complaint against it is not well founded. We, therefore, approve the ruling of the court in his charge to the jury.

7. Likewise the verdict of the jury. It is fully sustained by the evidence; in fact, we do not see very well how it could be otherwise.

8. The defendants in error here applied for damages, and whilst in a proper case we would not hesitate to award the same, when it appears that the cause was brought here for delay only; but inasmuch as the defendants in error joined in the request for extension of time here on the argument of the case, and with great ability and learning consumed three hours to sustain the rulings of the court below, we must conclude that the plaintiffs in error had reason to hope and to expect a reversal of the judgment below, and their purpose was not delay only.

Judgment affirmed.

## JOWERS vs. BAKER

L filed a bill for account and settlement against B, who answered in the nature of a cross-bill, making J a party. J answered in the nature of a cross-bill against both B and L. B filed a plea of bankruptcy, and the case was dismissed as to him; it proceeded to trial between J and L. J excepted to the dismissal as to B:

*Held*, that both L and B were necessary parties to the bill of exceptions, and for failure to serve L the writ of error will be dismissed.

Practice in the Supreme Court. September Term, 1880.

Reported in the decision.

E. G. SIMMONS, by JACKSON & LUMPKIN; T. H. PICKETT, for plaintiff in error.

BLANDFORD & GARRARD, for defendant.

JACKSON, Chief Justice.

A motion was made to dismiss this writ of error on the ground that John G. Lidy, the complainant, was not made a party to the bill of exceptions, and there was no service of the bill upon him. The bill of exceptions simply alleges that the bill in equity was filed by Lidy against Baker and Jowers, and that there was a cross-bill of said Baker, and that the court, by agreement, passed on the issue made by the plea of Baker, setting forth a discharge in bankruptcy, and held Baker discharged from the debt set forth in the pleadings—"which ruling is assigned as error."

On looking to the pleadings it appears that Lidy is the complainant, and that Baker and Jowers are defendants, who filed answers in the nature of cross-bills. Jowers excepted, and only served Baker, the other defendant, because the main contest seemed to have been between those two defendants; but it would be a novel proceeding to

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*Amos vs. Dougherty et al.*

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bring a cause between a complainant and two defendants to this court without serving the complainant and making him a party. Though the two defendants may have litigated with each other by issues made in the cross-bills, yet the complainant brought the case into the court below and prayed relief, and in the cross-bills, or answers in the nature of cross-bills, the prayer was for relief against him as well as against the co-defendant. In any view of the case, the complainant is a necessary party, and should have been made so by service, and the writ of error is dismissed. See *Brown vs. Kennedy, sheriff, et al.*, and *Jordan vs. Kelly and Brother, September term, 1879.*

Writ of error dismissed.

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AMOS vs. DOUGHERTY *et al.*

The remedy by possessory warrant is applicable, for the purpose of recovering the possession of property, where such possession has been lost by fraud, violence, etc. Where the title is obtained by fraud, and possession accompanies it by consent of the owner, the writ does not lie, nor will the tender back of what was received in exchange, authorize a possessory warrant.

Possessory warrant. Fraud. Action. Before Judge BUTT. Chattahoochee Superior Court. March Term, 1880.

Reported in the decision.

BLANDFORD & GARRARD, for plaintiff in error.

C. J. THORNTON, for defendants.

CRAWFORD, Justice.

This case originated in a possessory warrant sued out by the plaintiff in error to recover the possession of a horse which he had swapped to the defendants in error. The right to recover under the warrant, rested upon the

ground as set forth therein, that the horse was taken and carried away from his, Amos', possession without his consent, by fraud, violence, seduction or other means, and was received and taken possession of by the defendants.

Upon the trial of the case the justice awarded the possession to the plaintiff, whereupon the defendants resorted to their writ of *certiorari* to the superior court, and upon the hearing the judge sustained the *certiorari* and ordered the possession to be restored to the defendants, which judgment is here complained of as error.

This is the second time during the present term that this identical question, arising out of a swap in horses, has been before this court. See *Welborn vs. Shirley*, not yet reported. The ruling in that case must control this, although it was insisted in the argument that it should not, because in that case there was no tender back of the property by the person complaining.

The possessory writ was never intended to do more than restore the *possession* of the property to the party from whom the said *possession* was fraudulently and without consent obtained. Where the *title* is obtained by fraud, and the *possession* accompanies it by the consent of the owner, the writ does not lie. Where one gets the *possession* alone by fraud, violence, etc., or where the property disappears without the owner's consent, and is taken possession of by the party complained against, then in those cases the statute gives the possessory writ as a speedy remedy to restore the possession.

The tender back of whatsoever may have been given in exchange by the complaining party, will not make that possession which simply followed title, such possession as is declared by the statute to be necessary to authorize the exercise of this remedy.

Judgment affirmed.

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Gammage *et al.* vs. The Georgia Southern Railroad Company.

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GAMMAGE *et al.* vs. THE GEORGIA SOUTHERN RAILROAD  
COMPANY.

1. Where a bill alleged that for the purpose of securing the right-of-way through land, a railroad corporation had the writ of *ad quod damnum* issued, assessment made, from which there was an appeal to the superior court, and final trial had, resulting in a verdict for the property owner, simply finding for him \$1,250.00, and directing that upon the payment of such sum the title to the land should vest in the company, but establishing no special lien thereon; and that pending these proceedings the railroad first taking possession of the property became insolvent, and was sold under decree to defendant, which has since been using the same as part of its right-of-way and road-bed, praying injunction against the use of said land until payment of the assessment, and for general relief, it was error to dismiss the same on demurrer. There is no common law remedy adequate to such a case.
2. As complainants have belayed so long before making application for injunction, this court will not interfere with the discretion exercised in refusing the same, but will direct that the chancellor, on final trial, shall submit to the jury whether the injunction shall issue, to be stayed ——— days to enable defendant to make payment.

Equity. Injunction. Railroads. Constitutional Law. Eminent Domain. Before Judge UNDERWOOD. Floyd County. At Chambers. April 9th, 1880.

Reported in the decision.

ALEXANDER & WRIGHT; WRIGHT & FEATHERSTON,  
for plaintiffs in error.

DANIEL S. PRINTUP, for defendant.

HAWKINS, Justice.

Davis Gammage and John H. Sheibley brought their bill in equity in the superior court of Floyd county against

the Georgia Southern Railroad Company, in which they allege the following facts:

On August 26th, 1859, Davis Gammage owned and possessed a farm near the city of Rome, in said county. On that day the Selma, Rome & Dalton Railroad Company obtained from the clerk of the superior court of said county, under its charter, a writ of *ad quod damnum*, directed to the sheriff, requiring him to summon a jury to assess the compensation which the railroad company should pay said Gammage for right-of way for their road through his said farm. The jury having been duly summoned by the sheriff, met on August 31st, 1869, and rendered a verdict which, omitting the preliminary recitals, is as follows:

"We, the jury, find that the said Selma, Rome & Dalton Railroad shall pay the said Davis Gammage \$384.00 damages for the right-of-way, and such other and further rights as are incident thereto; and that the said Selma, Rome & Dalton Railroad Company shall, in consideration thereof, and in consideration of the advantages and increased value of the property of said D. Gammage, by reason of said railroad's running through the same, be entitled to a strip of land 100 feet wide the whole length through said land, \* \* \* and the title to said strip of land, with the rights incident thereto, shall vest in the said Selma, Rome & Dalton Railroad Company, upon a full compliance with the terms of this verdict."

From this verdict Gammage appealed to the superior court, where the case was tried at the January term, 1874, and a verdict rendered assessing the damages at \$1,400.00. The railroad company moved for a new trial, which was granted unless Gammage would write off the verdict to \$800.00, which he declined to do. The case was again tried at the March term, 1879, when the jury rendered a verdict for \$1,250.00. The railroad company again moved for a new trial, which was refused. The case was then carried

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*Gammage et al. vs. The Georgia Southern Railroad Company.*

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to the supreme court, where it was heard at the September term, 1879, and the judgment of the court below refusing a new trial affirmed.

Pending this litigation, the lands in question, on March 4th, 1873, were sold by the United States marshal for the northern district of Georgia, as the property of Gammage, under a decree of the Federal court, and John H. Sheibley became the purchaser, and has since owned the same. He and Gammage have agreed between themselves as to the recovery that may be had for said right-of-way.

The railroad company had, before beginning the proceedings to assess the damages, taken possession of the land and built its road on it. It continued to occupy and use the land for its railroad up to the month of November, 1874, when the company having become insolvent, its railroad, together with its franchises and all its property situated in this state, was sold under a decree of the superior court of Floyd county, and bought by a company of individuals who, on the second day of March, 1875, had themselves incorporated by the legislature under the name of the Georgia Southern Railroad Company, with right to hold and enjoy all the rights, franchises and property which had belonged to the Selma, Rome & Dalton Railroad Company, in this state. The last named company thus became extinct, and the proceeds of the sale of its property, franchises, etc., were distributed by the court to its creditors.

The new company, since its purchase of the railroad, has been continuously, and is now, in possession of the land in question, running its trains daily over the same. This company, at the time of its purchase, had full notice of the pendency of the proceedings to assess the damages for right-of-way through this land, and that the former company had not obtained such right-of-way. D. S. Printup, one of the purchasers, and a director in the new company ever since its formation, was also a direc-

tor and the vice-president of the old company; was its attorney in the assessment proceedings from their initiation to the time of the sale of the road, and, as a commissioner appointed by the court, sold the road to the new company.

The Selma, Rome & Dalton Railroad Company having become extinct, and having no officers, agents or attorneys to prosecute or defend suits, the new company, the Georgia Southern, after its purchase of the road, carried on and conducted the litigation in regard to the damages for right-of-way aforesaid, in the name of the Selma, Rome & Dalton Railroad Company, to the final termination thereof. And this company reserved out of the purchase money at its purchase of the road, an amount to meet whatever sum might be finally assessed for said right-of-way through this land in the proceedings then pending.

After the termination of the suit to assess the damages, and the confirmation by the supreme court of the final verdict assessing \$1,250.00 for such damages, the complainants expected that the Georgia Southern Railroad Company would pay the amount assessed without further trouble, but they have made demand upon it for payment of the assessment, and have been refused.

The prayer is for an injunction to restrain the defendant from passing over or trespassing upon said land, until it shall pay to complainants the amount assessed for right-of-way over said lands, with interest from the date of the assessment, and all costs; that upon the final hearing the defendant may be required to pay said assessment, and also the sum of \$250.00 for the attorney's fees of the complainants, and for general relief.

Upon this bill, the judge of said court, the Hon. J. W. H. Underwood, upon application of the complainants, granted at chambers an order requiring the defendant to show cause why the temporary injunction prayed for



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should not be granted. This application came on for hearing on April 8th, 1880, when the defendant filed its demurrer to the bill, alleging the following grounds:

1. There is no equity in the bill.
2. The complainants have an adequate remedy at law.
3. Misjoinder of parties complainant.
4. Misjoinder of parties defendant.
5. Complainant, Gammage, has a judgment at law adequate and complete against the Selma, Rome & Dalton Railroad Company.
6. The defendant has no interest in unison with the Selma, Rome & Dalton Railroad Company, that would entitle the complainants to any relief or action either in equity or at law against this defendant, and especially none under the charges in said bill.

The court upon the hearing refused the injunction, and also sustained the demurrer and dismissed the bill upon the ground that there was no equity in the bill, and the complainant had an adequate remedy at law.

The bill of exceptions recites the facts as to the hearing and the action of the court, and complains that the court erred in refusing the injunction, and also in sustaining the demurrer and dismissing the bill.

1. Was the decision of the chancellor right in dismissing the bill upon the ground that complainants had a complete common law remedy?

In 54 Ga., *Remshart vs. Savannah & Charleston Railroad Company*, this court held that a landowner whose property was taken years ago for roadway by a railroad company, and who had lately obtained judgment for damages according to the charter, has, so far as appears, an ample legal remedy by levy and sale, or by ejectment; and that another company succeeds by charter to the rights and privileges of the former (which has been levied on by virtue of the judgment), is no ground for enjoining the latter company from using the roadway. If the com-

plainant still had title, he can recover in ejectment, with *mesne* profits, and if he has not title, his judgment stands in lieu thereof, and his remedy to collect is not defeated by the mere interposition of the claim.

We presume the chancellor dismissed the bill on consideration of the case in 54 *Ga.*, 598.

Whether the property levied on in that case was real or personal estate owned by the Savannah & Charleston Railroad Company, used in the transportation by it as a public carrier, or property otherwise claimed and held, does not appear, nor does it appear but that the judgment in that case was by adjudication a special lien, moulded as is required in §§3082, 3362, 3639 of the Code, in either of which cases the complainant would have an adequate remedy by levy and sale, or by ejectment; because, in the one case, he would have perfect title that could not be appropriated without compensation, and in the other, a judgment as *in rem*, fixing the liability of the corporation and the mode of enforcement.

The case at bar is quite different. Here the taking was sought by a foreign corporation, domesticated by act of the general assembly of the state of Georgia, under a writ of *ad quod damnum*, assessment of value made, from which there was an appeal and final trial had at the March term, 1879, of Floyd superior court, resulting in a verdict for \$1,250.00, in the following language, in substance: "We the jury find that the Selma, Rome and Dalton Railroad Company shall pay to said complainants, \$1,250.00, and upon the payment of said sum the title to the lands shall vest in said company."

There was no special lien created by the judgment as the Code provides, and therefore, according to the ruling of this court in the case of *City of Atlanta vs. Grant, Alexander & Co.*, 57 *Ga.*, 340, the road-bed, cars, rolling-stock, and such property as serves the public by the corporation as a common carrier, could not be sold; and,

besides, the damage to the land might be ruinous either to his own use or to any one else except the corporation.

This judgment, having none of these properties, cannot sell the defendant's railroad property, and the complainants are remediless in this regard.

The effect of a recovery in ejectment would not do the complainants complete justice, because, concede them right, and the eviction accomplished by the sheriff under the writ of possession, yet the corporation could offer just compensation, say the next day, and put the complainants to continued expense, delay and litigation. These troubles in the enforcement of the common law remedies, make it wise for a court of equity, which is always open and does justice, not by halves, but entire and complete, to all the parties, to take jurisdiction of the case and administer the law.

Besides, it was strongly intimated by this court in the case last mentioned, 57 *Ga.*, 340, that these public interests are not subject to levy and sale by judgment at law, and we think the court erred in dismissing the bill.

2. We have no doubt upon the other point, if the complainants had not delayed so long in the application for injunction.

It is the exercise of the highest power known to government to take the property (perhaps the home) of one man without his consent, and transfer it to another on the payment of just compensation, and hence all good governments disallow the same until the compensation is paid or tendered, and yet this corporation has used the complainants' land now for over ten years, without rent and without payment.

The Selma, Rome & Dalton Railroad Company became bankrupt, and was sold out to the present company, the defendant, at judicial sale, with possession, and it became subrogated to all the former's rights, and still continues the use of complainants' land without compensation. Complainants are in a court of equity, with an established claim

of \$1,250.00, fixed by a jury and affirmed by this court, without a judgment with any special lien ; a bare right to enter after eviction or ejection, to be dispossessed the next day.

We think an injunction a proper remedy, but inasmuch as the complainants have so long delayed to seek this, the harshest of all civil remedies, we do not reverse the judge on that point, but direct that if on the trial of the case before the jury, the decree shall be for the amount to which complainants are entitled, then the chancellor will submit to the jury, as part of the case, and they may decree that the injunction issue, to be stayed ——— days to enable defendant to make payment, and upon default the injunction to become operative.

Judgment reversed.

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### JONES vs. THE STATE OF GEORGIA.

1. That the judge in a criminal case stated in regard to an immaterial point that there was no conflict, when in fact there was no dispute on that point, will not necessitate a new trial.
- (a) While it may not have been best for the court to state the law in regard to the crime of murder in an interrogative or argumentative way, yet where it was not so done as to injure the defendant, a new trial will not be granted on that ground.
2. Where the indictment charged two modes in which the killing was done, if the evidence showed that the defendant was guilty, it made no difference whether death resulted from one mode or the other, or both.
3. The jury are no more judges of the law and facts in a case of circumstantial evidence than in other criminal cases.
4. The verdict is supported by the evidence.

Criminal Law. Charge of Court. New Trial. Before Judge HOOD. Randolph Superior Court. May Term, 1880.

Jones was indicted for the murder of his little step-son.

One count in the indictment charged death by strangulation, another by burning. The corpse when found was in the fire-place. It bore marks both of burning and strangulation. The court charged, among other things, as follows: "If it be true, under the evidence (under the rules of law I will hereafter give you in charge) as charged by the state in this case, that the accused, Luther Jones, killed this child of tender years (there being no dispute as to the age of the deceased), you will look to the evidence and see what was the provocation for the deed, what circumstances of alleviation, palliation, or justification are in the case; if the circumstances are not shown does it not follow that the killing shows an abandoned and malignant heart, etc.? \* \* \* If, therefore, you should find from the evidence (and I express no opinion on the evidence in the case) that the deceased was killed by the defendant," etc.

Defendant was convicted. He moved for a new trial, which was refused, and he excepted.

For the other facts, see the decision.

R. E. KENNON; W. C. WORRILL, by brief, for plaintiff in error.

R. N. ELY, attorney-general; JAS. T. FLEWELLEN, solicitor-general, by JNO. PEABODY, for the state.

JACKSON, Chief Justice.

The defendant was indicted for the offense of murder, in that he killed his step-son, a little boy six years old, by strangulation or by burning. The testimony is circumstantial; but this is the third verdict, two new trials having been granted by this court before on errors of law. See pamph. dec., September term, 1879, p. 13; *Ib.*, February term, 1880, p. 36.

The motion for a new trial now is predicated upon the ground that the evidence is not sufficient to sustain the

verdict, and that the court erred in three particulars in the charge.

1. The first is an allegation that the judge expressed an opinion on the evidence in that he said that there was no dispute about the age of the child who was killed. The truth is that there was not only no conflict in the testimony about the child's age, but no dispute about it at all. Nor was it material. The fact is he was a little innocent child and the exact age made no difference. The judge too, did comment on the heinous nature of the crime, but made no intimation that defendant committed it. The allusion to the age was parenthetical and merely incidental, and to hold such an allusion error under §3248 of the Code, and to grant a new trial on that ground, would be to bring the administration of justice into disrepute. The comments of the court in interrogative and rather argumentative style on the heinous character of the offense, but with no intimation of opinion that this defendant was the person who perpetrated it, while perhaps not altogether necessary to the adjudication of the law of the case, are not violations of the law and cannot be so pronounced.

2. The second ground is no stronger. There are two counts in the indictment, one for murder by strangulation, the other by burning. The judge said if the child was killed by defendant, and the facts made a case of murder in the judgment of the jury, it did not matter whether defendant used one or the other, or both of the modes, and the death resulted therefrom. We see no error in this charge.

3. The third error assigned on the charge, we think, is as weak as the others. It is that the court said, after having given in charge to the jury their full rights in regard to their being judges of the law as well as the facts, that they were no more judges of the law in cases of circumstantial testimony than in cases of direct evidence. We are not aware that the law makes their power or right to

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Ross, administrator, vs. Worsham.

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be judges of it greater or less in the one case than in the other, and we can see no error in the judge so instructing the jury.

The testimony, though circumstantial, points to the defendant as the perpetrator of this heinous crime, and points to him with sufficient moral assurance of his guilt to satisfy the jury and to authorize their finding.

Though a terrible crime, yet as the evidence of guilt was from circumstances alone, the jury very properly remitted the death penalty and sent the defendant to the penitentiary for life. He must abide that sentence.

Judgment affirmed.

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ROSS, administrator, vs. WORSHAM.

When in the bankrupt court an exemption is granted by the judge or register, such exemption is no more subject to levy and sale than if it had been set apart by the ordinary having jurisdiction thereof.

Bankrupt. Homestead. Before SAMUEL HALL, Esq., Judge *pro hac vice*. Bibb Superior Court. April Term, 1880.

Reported in the decision.

LANIER & ANDERSON, for plaintiff in error.

BACON & RUTHERFORD, for defendant.

CRAWFORD, Justice.

A mortgage *fi. fa.* having been levied upon certain land therein described, the defendant in the *fi. fa.*, who was a discharged bankrupt, claimed the same under an exemption granted him by his assignee, and insisted that it was therefore not subject to levy and sale. It was admitted that no proceedings had been taken before the ordinary under the laws of this state to obtain the said homestead

exemption. The counsel for the plaintiff insisted that the setting apart of said property by the assignee was insufficient to exempt it from sale, the defendant in *fi. fa.* not having proven his debt in the bankrupt court, nor the defendant having applied for or obtained any homestead exemption by the ordinary of said property, under the laws of Georgia.

The judge below, to whom was referred the questions, both of law and of fact, held "that the claim be sustained, and that the property be adjudged not subject to the *fi. fa.*"

This ruling has been assigned as error, and the question presented for our judgment is, whether the assignee in bankruptcy can exempt such property to the bankrupt as may be allowed him by the laws of the state, or shall he be compelled to apply to the ordinary to set it apart before the same is exempt?

It is provided by the bankrupt law that all the estate, real and personal, of the bankrupt shall be conveyed to and vest in the assignee, except certain specified articles particularly mentioned, and then such other property as is exempted from levy and sale by the laws of the state in which the bankrupt has his domicil at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state as existing in 1871, and such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws. And in no case shall the title of the bankrupt to the property so excepted be impaired or affected by any of the provisions of this title.

It is further provided how and by whom the exemption is to be designated and set apart to the bankrupt as his property under the fourteenth section of the act of congress, approved March the 2d, 1867. Upon the trial of this case it was conceded that this had been done. So that the question recurs whether, when this has been done, that it is a mere nullity, unless the party shall again go



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Ross, administrator, *vs.* Worsham.

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before the ordinary and have his exemption exempted. We cannot see this necessity, especially when the property has been scheduled, specified, admeasured, valued and set apart as provided by the proper authority under the laws governing such matters.

Indeed, it has been ruled "that where a homestead has been duly allotted under the state law and there is no fraud in it, such allotment will be recognized and allowed. Where an allotment has not been made previous to the commencement of proceedings in bankruptcy, the homestead may be ascertained and set apart by the assignee." *In re E. A. Vogler*, 8 B. R. 135.

Besides, we think that such has been the ruling of this court upon this subject. In the case of *Bush vs. Lester*, 55 Ga., 579, this court say, in referring to the effect of a discharge in bankruptcy upon land set apart to the bankrupt as exempt—in the second head-note—"The land is protected from levy and sale under the judgment, to the same extent only as it would have been protected by the homestead and exemption laws of this state, had no proceedings in bankruptcy taken place."

In sustaining the above head-note, in the opinion written by Justice BLECKLEY, he says: "What has been done by the assignee is equivalent to compliance with the state statutes in assigning homestead or claiming exemption, but has no higher validity or greater sanctity." We do not claim that what was done by the assignee has any *higher validity* or *greater sanctity*, but exactly the same, and as he says, "is equivalent to compliance with the state statutes." Nor are we left in doubt as to what he conceives to be the legal effect of such exemption, for in this same connection he says: "Exemption granted in bankruptcy resting on the state law, has precisely the same effect against prior liens as exemption granted out of bankruptcy, or by the instrumentalities appointed by the state." If, therefore, it has precisely the same legal effect, wherefore the necessity of repeating what has

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*Ayers vs. Lamb.*

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already been done in bankruptcy, by the instrumentalities appointed by the state?

Nor are we to be understood as deciding any question besides that made by the record, which is that when an exemption is granted by the judge or by the register in bankruptcy, that the same is no more subject to levy and sale than if it had been set apart by the ordinary having jurisdiction thereof.

What title he takes, or what interest therein, if any, his wife and children may have, is not in this case and is therefore not decided. It is to be remembered that in this case, the debt which is the subject of the controversy was contracted after, and not before, the homestead exemptions of 1868-9, and hence involves no question of the right of exemption against a debt contracted prior to that time. Neither do we understand this judgment to be in conflict with any former ruling of this court, but recognizing as we do the superior power of congress over the subject of bankruptcy and exemption, we are not prepared to say that an exemption, though unconstitutional when allowed by state authority, may not become constitutional when allowed by an act of congress, the latter being invested with the power to enact laws upon this subject which is denied to the former. At all events, such a view would perhaps harmonize what is conflicting between the state and federal judiciary.

Judgment affirmed.

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*AYERS vs. LAMB.*

The plaintiff in execution may, of his own motion, without any action of the court, dismiss a levy, though an issue may then be pending thereon. A subsequent levy is not thereby invalidated.

Levy and sale. Practice in the Superior Court. Before Judge PATE. Pulaski Superior Court. May Term, 1880.

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Ayers vs. Lamb

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Reported in the decision.

JAMES A. THOMAS, for plaintiff in error.

O. C. HORNE, by brief, for defendant.

HAWKINS, Justice.

Asher Ayers foreclosed a landlord's lien in Pulaski superior court against N. B. Lamb, for the sum of \$301.78. Execution issued against the property therein named, and was by the county court bailiff levied on the same, to-wit: on the sixth day of October, 1876. The defendant contested the same and filed his affidavit and gave bond as the law required, which *fi. fa.*, levy, counter-affidavit and bond, were by the bailiff returned to the superior court, filed and entered in said court. On the first day of December thereafter, plaintiff's attorney dismissed the levy, upon the ground that the same was illegal, and had the sheriff to levy the execution upon the same property, to which the said Lamb filed his counter-affidavit, bond etc., as before, as the law required, and which papers the sheriff returned to Pulaski superior court. When the same came up for trial, Lamb moved the court to dismiss the levy made by the sheriff, upon the ground that the same was illegal, as it was made pending the first levy and counter-affidavit and while the case was undisposed of by the court, and that the dismissal of the first levy could not be done by the plaintiff's attorney, pending the first illegality, without an order of the judge at chambers or by the court. Which motion the court sustained and dismissed the levy, and this is the only assignment of error.

Whether it is competent to dismiss a levy while an issue is pending thereon in the court to which the proceedings are returned, has never been passed upon by this court directly.

In 8 *Ga.*, 327, the case of *Lynch vs. Pressley*, the court says: "Can an execution which has been levied on personal

property, which is claimed by a third party, be re-levied until the claim is disposed of? We are not prepared to say it could not. A distress which will only cover a part of the rent may be followed up by immediately distraining again. Bradley on Distress, p. 130. Any other doctrine would be ruinous to creditors. A levy is made upon a *modicum* of property, which, at a fair sale, would not pay a titling of the debt—a horse, for instance, to satisfy a *fi. fa.* of \$1,000.00. A claim is interposed. Is the plaintiff compelled to wait until this issue is decided before he can re-levy? Are his hands so tied that the debtor may eloin the rest of his effects, and thus defeat the judgment? We apprehend not.”

In 19 *Ga.*, *Branch vs. Baily*, the court says that after a *fi. fa.* has been levied, a claim interposed under our claim laws and returned to court, the sheriff has no right to withdraw the execution at his pleasure, but the same must be withdrawn by leave and order of the court. The purpose of the withdrawal in this case was to make another levy. See 19 *Ga.*, 161.

So in the case of *The State vs. Jeter*, decided at the January term, 1880. The *fi. fa.* was withdrawn to make a new levy, while a levy was undisposed of on the paper, and the court said: “It would not do to allow the sheriff to withdraw papers essential to try cases pending in court without an order, whenever he deemed a levy illegal.”

But the case at bar differs essentially from the former cases, in this, that in all the other cases there was an undisposed-of levy; there still remained a case in court to be tried after the action of the sheriff or plaintiff in withdrawing the *fi. fa.*; and, besides, the purpose was to make another levy, and thereby create two or more claim cases in the court, perhaps of different claimants touching the same lien, and prevent the use of essential papers on the trial of one or more of the cases.

In those cases third party claimants were interested in the papers, and had the right to have them remain of file in

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McDowell vs. McKenzie.

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the court. But here the levy was dismissed, and that was a final disposition of the case, to all intents and purposes, as much so as if the same had been dismissed in open court, and by leave of the court.

Code, §3447, provides that the plaintiff in any action in any court, may dismiss his action (at any time) either in vacation or term time.

We think the dismissal of a levy puts an end to the case, and that whenever it can be so dismissed, without injury to the defendant or claimant interested, the plaintiff has the right to do so.

There is quite a difference between the dismissal of a levy and the withdrawal of a *fi. fa.* to make another levy: the one multiplies suits, the other dismisses and ends the only suit.

Were it otherwise, a plaintiff having committed a trespass upon the defendant and seized valuable personal property by an illegal levy, could not relieve or mitigate the damages occurring between the levy and the obtaining of the order of the judge allowing him to dismiss.

We therefore think the court erred in dismissing the levy made by the sheriff.

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MCDOWELL vs. MCKENZIE.

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A merchant whose agent purchased goods in New York on a credit—although the credit was unauthorized—cannot refuse to pay, when he has received and sold the goods, and pocketed the proceeds; especially where he has paid other bills made by the same agent.

Principal and agent. Before Judge HOOD. Clay Superior Court. March Term, 1880.

McKenzie sued McDowell on an account for goods purchased by his agent. On the trial, the jury found for plaintiff, and defendant excepted. The facts are stated in the decision.

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The Western & Atlantic Railroad Company *vs.* Jones.

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KENNON & HOOD, for plaintiff in error.

E. C. Bower, for defendant.

JACKSON, Chief Justice.

This case turns on a single question: Can a merchant in Georgia, whose agent buys goods in New York, though on credit, and the credit unauthorized by the Georgia merchant, legally refuse to pay for the goods, when they have gone into his possession, been sold for him and he has pocketed the proceeds, especially when he had paid other bills bought on a credit by the same agent? To propound the question plainly is to answer it in law, as well as in good sense and common honesty.

Judgment affirmed.

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THE WESTERN & ATLANTIC RAILROAD COMPANY *vs.*  
JONES.

[JACKSON, Chief Justice, was providentially prevented from presiding in this case.]

Railroads are required by law to establish posts on each side of public crossings, to blow the whistle and check the speed of its trains in approaching them, so as to be able to stop should any one be on the crossing. While these provisions are intended to protect life and property at such crossings, yet where an accident took place just beyond a crossing, the fact that these requirements were disregarded may be considered by the jury in determining the question of negligence on the part of the employes of the railroad.

Railroads. Damages. Negligence. Before Judge McCUTCHEN. Catoosa Superior Court. February Term, 1880.

Reported in the decision.

W. H. PAYNE; I. E. SHUMATE, for plaintiff in error.

W. K. MOORE, for defendant.

CRAWFORD, Justice.

This suit was brought against the Western & Atlantic Railroad Company, to recover damages for a horse killed by one of its trains, and for which the jury found a verdict in favor of the plaintiff for the sum of ninety dollars.

A motion was made for a new trial—because the evidence did not support the verdict, and because the court erred in the instructions given to the jury.

The killing was not denied, and the questions of value and diligence were the controlling matters in issue. The testimony was with the plaintiff on the value—and under the decision of this court in the 61 *Ga.*, 11, it was also with him in the matter of diligence.

Unless, therefore, the court erred in its charge, and refusal to charge, the judgment must be affirmed. The defendant requested the following charge—"That all the regulations prescribed in section 708 of the Code, as to blow-posts, and blowing and checking the trains, are intended solely as a means of insuring safety to persons or things on the crossings, or in the act of crossing, and do not apply to stock which is not on the crossing, or being driven across the same." In lieu of the above request the court charged—"That the law requires railroad companies to establish blow-posts, and to blow the whistle four hundred yards before reaching a public crossing, and to continue to blow, to check the speed of the train, and continue to check so that they may stop if any person or thing should be crossing the track, and is intended to apply directly to the protection of such crossing.

"But if you believe this company failed to comply with this law, and that such failure contributed to the killing of the plaintiff's horse, you may consider this in connection with all the other facts and circumstances of the case in determining whether or not the killing was caused by the negligence of the agents of the company."

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Cherry, for use, vs. The North & South Railroad.

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Looking at this charge in the light of the evidence and the law governing such cases, we cannot hold that it was error. Trains are to be run in obedience to law, and if they should be run at any time or place, in violation of a positive penal statute of the state, such an act is not only one of negligence, but of crime, and any injuries to others resulting *therefrom*, must be responded to in damages. Signal posts and the sounding of the alarm whistle, it is true, are intended to protect life and property at public crossings, but more than this is required the employes of the roads must have their trains sufficiently in hand to warrant absolute protection at those points, and a failure to do this is negligence. So that in this case, had the engineer and the men under him obeyed the law, then the speed of the train could have been checked in time to have prevented injury on the crossing itself, but having disobeyed it he was unable to check it in time to prevent the injury which occurred a short distance beyond. The absence of the signal post, the failure to give the usual warning upon approaching the crossing, as well as the neglect of having his train under control at a point where the law declares it his duty to do so, may well be considered by the jury in determining upon the question of negligence in killing the horse just at the place where he was killed. Finding therefore no error in the charge of the judge, nor in his refusal to charge, the judgment is affirmed.

Judgment affirmed.

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CHERRY, for use, vs. THE NORTH & SOUTH RAILROAD.

1. Suit must be brought on a contractor's lien within twelve months from the date of its record. The mere filing of a declaration in office, unless followed by proper service upon the defendant, is not the commencement of suit.
2. Though the railroad may have been seized by the governor under an act of the legislature prescribing such course in case of its fail-



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Cherry, for use, *vs.* The North & South Railroad.

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ure to meet the interest due on its bonds indorsed by the state, this did not abrogate its obligations to others, and the failure to sue on such lien within twelve months from its record, notwithstanding such seizure, destroyed its vitality.

Lien. Railroads. Actions. Service. Before JAMES T. WILLIS, ESQ., Judge *pro hac vice*. Harris Superior Court. October Term, 1879.

Reported in the opinion.

INGRAM & MATHEWS, for plaintiff in error.

W. A. LITTLE, for defendant.

HAWKINS, Justice.

On the tenth day of March, 1879, W. C. Cherry, for the use of another, commenced an action in the superior court, of Harris county, on the common law side of the court, for equitable relief, and to enforce and foreclose a contractor's lien dated and recorded in the superior court on the fifteenth day of January, 1874, against the North and South Railroad Company, a corporation chartered by the legislature of the state in 1870.

The petition alleged that he was a railroad contractor, and under contract with said corporation, built a trestle or an extension of a certain bridge over Mulberry Creek, traversed by said railway, for the sum of one thousand one hundred and eighteen dollars and fifty-seven cents. That the work was completed on the ninth day of January, 1874, and at the April term of Harris superior court he commenced his action to enforce his said lien and of assumpsit, the company then having an agent doing business in said county—that after the filing of said suit, and before the same was served upon its agent, then in said county and transacting business for said corporation, the same was seized by the state—that on the twenty-third day of April, 1874, and after the filing of said suit, the gov-

error, having previously indorsed the bonds of said corporation to the amount of two hundred and forty thousand dollars, on non-payment of the interest on said bonds, seized said road and so retained and kept said road and its property until the twenty-fifth day of October, 1878, when it was sold as the law allowed, to the defendants, and they are now the owners of said railroad. That while the state so held the same, no suit could be maintained against her sovereignty, and no legal service having been effected on the North and South Railroad Company before its seizure by the state, the original suit was dismissed in 1877; that in October 1878, the state sold the road and the defendants to this suit became the purchasers and are now using and owning the same.

He prays that his lien may be enforced and such relief may be had as could be granted by a court of equity, says the corporation is insolvent, and that his account has never been paid.

On the case being called the defendants (all of whom except the agent resided in Muscogee county and were served by second originals) demurred to said declaration and moved to dismiss said action, which motion the court sustained and dismissed plaintiff's case, and of this he complains here by bill of exceptions, and says the court erred in so ruling.

1. The contractor's lien for building the trestle or extending the bridge in January, 1874, as provided in sections 1979 and 1980, must be regarded and controlled as to its record, foreclosure and suit therein, as like unto the other liens created by similar legislation.

Its vitality depends upon three several things—the work must be completed—the lien must be recorded, and suit must be brought thereon within twelve months from its record; if the three things do not concur in fact, or there is a failure in either, then the lien is inoperative, even against the defendant. The declaration alleges the completion of the work, the recording of the lien, and the bringing of a

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suit thereon in Harris county within twelve months by filing the declaration, but omits to show any service upon the defendant or its agent, but shows service upon the agent of the state after the seizure thereof by the state of Georgia.

Was this the commencement of the suit, or was that suing the lien within twelve months, as is provided in sections 1981-2? It is true the Code says that the filing of the declaration with the clerk is regarded as the commencement of the suit, but this must be construed with kindred regulations for suits and the service thereof.

In *Ferguson vs. New Man. Man. Co.*, 51 Ga., this court says that the commencement of a suit implies more than the mere filing. It must be followed up by a service, and if not, it would not be a suit in legal contemplation. Here there was no legal service of the original suit upon the defendant or its agent in Harris county, but the writ was served upon the agent of the state and was therefore no service.

2. The North & South Railroad was an artificial person, having a legal existence and capable of suing and being sued, and though the state under the provisions of its organic law, and according to its contract of indorsing these bonds, had seized the property of the corporation, still they were bound for their obligations and contracts and all liens created by law or contract, and which were enforceable in the courts, notwithstanding the default in the payment of interest on the indorsed bonds.

If it was competent for the plaintiff to file his lien in the county of Harris, it was quite as legal to sue the corporation, so as to obtain a judgment of the court against the property upon which the lien was recorded. This he did not do; but finding that the state had seized the property of the corporation, he took no further steps to enforce the lien until the year 1879, four years after the same was recorded. Whatever reason may exist for not suing on the lien within twelve months—whatever imped-

iments may prevent the suing within the time—the failure to sue is fatal to the lien. Nothing will release the holder of the lien from commencing a proceeding within the twelve months. If he fails to take legal steps within the time, his lien is nugatory. The demand of the law to move is inexorable. There being no suit to enforce this lien within twelve months, and this *quasi* equitable procedure to enforce it not being commenced until 1879, we think the demurrer was properly sustained. As this controls this suit, we deem it unnecessary to decide as to the priorities of the state in controversies with private citizens, or the effect of the sale to the present owners of the railroad.

Judgment affirmed.

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FIELDS vs. ALLEY.

In this case there being no good cause of exception and no appearance or representation in behalf of the plaintiff in error, on motion of defendant's counsel, the judgment is affirmed with ten per cent damages for delay.

Practice in the Supreme Court. September Term, 1880.

Reported in the decision.

No appearance for plaintiff in error.

C. H. SUTTON, for defendant.

JACKSON, Chief Justice.

In this case the defendant in error moved to open the record for the purpose of claiming damages under the 4282 section of the Code, which motion was granted. There is no appearance for the plaintiff in error, no abstract or brief filed, and no excuse of any sort for the failure of his

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Peek *vs.* Wright, administrator.

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counsel to represent the cause here, and the case was about to be dismissed for want of prosecution, when the defendant in error made the motion to open the record with a view to claim damages because the case was brought here purely for the purpose of delay.

The action was for slander, the verdict of the jury is for the plaintiff below, the defendant in error here, the sum of three hundred and fifty dollars. The proof disclosed in the record is overwhelming, there is no error of law in the court, the slander is the charge of adultery on the part of the female who brought the suit, there is no fact proven which sustains it, and no reason either for the slander or for bringing the cause here. It must have been brought solely for delay. The fact that no sort of preparation was made to prosecute the cause here, and that neither the party nor his counsel appeared here, or made excuse of any sort for not appearing, furnishes evidence, additional to the facts contained in the record, that delay was his sole object. Therefore the motion of the defendant in error is granted, and it is ordered that the judgment be affirmed, with ten per cent. damages for delay.

Judgment affirmed with damages.

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PEEK *vs.* WRIGHT, administrator.

1. The verdict in this case is contrary to law and the evidence.
2. A prayer for general relief, in addition to specific prayers, in a bill in equity, will only warrant the granting relief pertinent to the case made by the bill. Therefore such a prayer added to a bill, the specific object of which was to enjoin a trespass, would not warrant a determination of the title to the premises.
3. A charge not warranted by the evidence should not be given.

Verdict. New Trial. Equity. Practice in the Superior Court. Charge of Court. Before Judge UNDERWOOD. Polk Superior Court. February Term, 1880.

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Peck vs. Wright, administrator.

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Wright, the defendant in error, having died after the case reached this court, his administrator was made a party in his stead. For the facts, see the decision.

IVEY F. THOMPSON; DABNEY & FOUCHE; J. A. BLANCE, for plaintiff in error.

E. N. BROYLES, for defendant.

CRAWFORD, Justice.

Wright, the defendant in error, filed his bill in October, 1869, alleging that he was the owner of lot of land No. eleven, in the twentieth district and third section of Polk county; that he and those under whom he claimed had been in the peaceable possession thereof from twelve to twenty years; that he has a chain of title except from his vendor, whose bond for title he has, with purchase money paid; that he, and those under whom he claims, have cultivated part of it for twenty years, and complainant himself since November, 1863; that defendant has been trespassing upon it; that the damages are irreparable, and defendant has no property; wherefore he prays injunction to restrain trespass, and for general relief. To his original bill complainant filed two amendments, by the first of which he alleges that if defendant has regular chain of title from the state, his is the better title, because of his peaceable and continuous possession for more than seven years before defendant acquired title, and under color of title since eighteen hundred and thirty-three. By the second, that defendant had damaged him by cutting off and selling the timber from twelve acres of the land, worth two hundred dollars, and by cultivating the same for ten years, worth three hundred dollars, for which amounts he prays judgment against him and his security on the bond given upon the dissolution of the injunction.

The defendant by his answer denied being a trespasser,

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Peek vs. Wright, administrator.

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and asserted ownership from April 22, 1869; that complainant tried to purchase the land from the true owner before defendant bought, and offered to exchange another lot with defendant therefor; that complainant holds under fraudulent conveyances, and denies that he has ever been in possession.

Upon the bill and answer, the parties went to trial. The testimony of the complainant showed that he bought the lot in dispute, with others, in November, 1863, from one Ware, took a bond for titles and paid the purchase money. He received deeds to eleven, the disputed lot, running back from 1858 to 1833, none of which were recorded or showed any connection with the grantee. The possession relied upon, consisted of a small pen built about one hundred yards from the line, upon which to claim possession, but which was never used or repaired, and resetting a fence so as to enclose a strip of about one-fourth of an acre over the line adjoining other lands not disputed, and for the same purpose.

The defendant submitted a grant from the state to William Turner to number eleven, this lot, a deed from Turner to Barnett Malcom, deed from John and B. Malcom to John G. Malcom, upon the back of which was a relinquishment by John G. to John Malcom, Sr.—but which relinquishment was ruled out by the court—and a deed from William Malcom, executor of John Malcom, to Peek, the defendant, dated April 22d, 1869, under which he entered possession of the lot, cleared twenty-five acres of land, and has occupied it ever since.

Under the testimony the jury found the complainant the rightful owner of the land, and one hundred and seventeen dollars damages, from which finding a new trial was moved and refused, and the defendant excepted.

1. The material grounds of the motion are: 1. That the verdict is without evidence, contrary to evidence, contrary to law, and contrary to the principles of justice and equity.

2. Because the court charged the jury, that whilst they could not find a perpetual injunction, yet they might find the premises in dispute for complainant or defendant according to the evidence.

3. Because the court charged the jury, if neither party has a legal title, then he who has the prior possession may recover against a mere trespasser, or one who enters without any claim or right.

1. Is the verdict supported by the evidence? The most that can be claimed for the complainant, in our judgment, is, that he had only a color of title to the land in dispute. He had no connection with any grant from the state, no deed which had ever been recorded, no possession except the one-fourth of an acre along the line, and the small pen spoken of; with, indeed, nothing calculated to show dominion over it, or to put others on notice of any adverse possession. Being then without legal paper title, his color and possession would only extend to the boundary actually occupied, and not to the whole tract, even admitting that it did not originate in fraud.

Upon what right then he could reach beyond his actual possession and recover damages for an alleged trespass, committed by one who acquired possession, not by mere entry and without any lawful right whatever, but who shows a grant from the state to Turner, from him to Barrett Malcom, and a deed to himself from William Malcom, executor, etc., under which he entered, we do not clearly see. It is true that there is a break in his chain, but he shows a paramount outstanding title, and that he was not a trespasser.

We think, therefore, that the verdict is unsupported by the evidence and contrary to law.

2. The judge charged as set forth in second ground, that they might find the premises in dispute for the complainant or the defendant, according to the evidence.

The bill in this case was filed to restrain a trespass by an insolvent man and prevent injuries which were irre-



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Perry vs. Christie, sheriff.

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parable, and could not be compensated in damages. The prayer was for injunction, damages and general relief, but there was none for any decree touching the title, or the ownership of the land.

The prayer for general relief can only authorize and empower the chancellor, where the complainant mistakes his relief in the special prayer, to afford him such other as he may have a right to, *provided it be agreeable to the case made by the bill*. It could only be used in this case, therefore, to enlarge the right and power of the chancellor in restraining the trespass and recovering the damages, but no further.

3. The last ground of error complained of is, that the judge charged the jury that if neither party had a legal title, then he who has the prior possession may recover against a mere trespasser, or one who enters without any claim of right.

The testimony under our view of it, as set forth in the record, did not authorize this charge, and hence it was error.

Judgment reversed.

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PERRY vs. CHRISTIE, sheriff.

Where in response to a rule for failure to make the money on an execution, the sheriff showed that an illegality had been filed setting up numerous grounds, and amongst them that the execution did not follow the judgment, which he felt it his duty to accept, and asking time to procure the papers which had been returned to the superior court of the county from which the execution issued:

*Held*, that the discretion of the court in overruling a demurrer to the answer, no traverse having been filed, will not be controlled, it not appearing that the sheriff was in contempt, but on the contrary, that he was endeavoring to discharge his duty.

Rule. Sheriff. Levy and sale. Before Judge HOOD. Terrell Superior Court. May Term, 1880.

Reported in the opinion.

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Perry vs. Christie, sheriff.

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L. C. HOYL; C. B. WOOTEN, for plaintiff in error.

GUERRY & PARKS, by JACKSON & LUMPKIN, for defendant.

HAWKINS, Justice.

At the May term, 1880, of Terrell superior court, John B. Perry brought his petition for a rule against S. W. Christie, sheriff of said county, alleging that he had placed in the hands of said sheriff a *fi. fa.* in his favor against James W. Powell *et al.*, with instructions to levy it upon a lot of land and other property of said Powell. The sheriff levied the same upon a lot of land which was claimed by Thomas Powell. On the trial of the cause the property was found subject, and on writ of error to this court the finding was affirmed.

The sheriff was then ordered to sell the condemned land, and on proceeding to advertise and sell the same, an affidavit was filed by Powell and Mrs. Powell as executor and executrix of the defendant, James Powell, upon various grounds, one of which was that the execution was void because it did not follow the judgment. The affidavit was accepted and the papers returned to Calhoun superior court, from which court the *fi. fa.* issued. The petition prayed that the sheriff pay to plaintiff the sum of six hundred dollars, the supposed value of the land, and in default be attached for contempt.

To this rule the sheriff, on the next morning after the rule *was* granted, answered that after the litigation ended in the supreme court, he proceeded to advertise the land for sale, when Mrs. Powell and N. M. Powell, who were the executors of J. W. Powell, filed with respondent an affidavit of illegality, as before stated, upon many grounds, one of which was that the judgment was void, and the *fi. fa.* did not follow the judgment. He accepted said affidavit and returned the papers to Calhoun superior court, and asked

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Crine vs. Tifts & Co.

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the court to allow him time to obtain said papers to append to this, his answer. The lot of land was levied on as the property of the estate, and the executors had the legal right to file said affidavit, and it was his duty to accept the same. He says he acted in good faith in the premises and tried to do his duty. At the time he did not know what to do, and thought it was his duty to return said affidavit to the proper court, that the question might be decided by said court and protect respondent. If the court will allow him time, he can get said affidavit and show the court he has acted according to law.

The answer was amended by alleging that said *fi. fa.* was void in not following the judgment.

The plaintiff demurred to the answer, and filed no traverse thereto, which demurrer the court overruled and discharged the rule against the sheriff.

The plaintiff, Perry, assigns error in the refusal of the court to make the rule absolute.

It does not appear that the sheriff was in contempt of the court, but that he acted in good faith, and was trying to do his duty. It was a question of legal discretion of the court below in this equitable procedure, and we see no abuse of that discretion in refusing the rule absolute, and discharging the rule.

Judgment affirmed.

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CRINE vs. TIFTS & COMPANY.

1. A levy on "all the crops on the Ball place" was sufficiently specific to prevent its dismissal; especially at the instance of one who had interposed a claim to the property so levied on.
2. Three mortgages were executed, one in April and two in May, 1879. The description of the mortgaged property in each was as follows: "As an advance on my crops of cotton, corn, oats, etc., growing and to be grown in the year 1879, the same being now planted, to enable me to make my said crops, and do hereby give them a mortgage on all my said crops, to take effect as soon as my

crops are planted." It appears that all of the crops levied on were planted when the mortgages were executed, except possibly a little cotton:

*Held*, that the court was right in refusing to dismiss the levy thereunder, because the description was too vague, uncertain, and contradictory.

3. The presiding judge need not give in charge a principle of law which the evidence does not require.
4. The verdict is not contrary to law or the evidence.

Levy and sale. Mortgage. Charge of Court. New Trial. Before Judge WRIGHT. Dougherty Superior Court. April Term, 1880.

Reported in the decision.

JESSE W. WALTERS; D. A. VASON, for plaintiff in error.

D. H. POPE, for defendants.

JACKSON, Chief Justice.

Tift & Company levied a mortgage *fi. fa.* upon certain stock "and all the crops on the Ball place" as the property of defendant. The property levied on was claimed by Crine, and on the issue whether subject to the mortgage or not, the cause went to the jury; the jury found it subject, a motion was made for a new trial which was overruled, and claimant excepted.

1. Was the levy sufficient? It was on "all the crops on the Ball place," so far as the objection applies, the levy on the stock having been dismissed pending the trial. We think it sufficient, especially as the claimant interposed his claim thereto, and thus claimed all the crops, and must have known what it was. The court was then right not to dismiss the levy. 54 *Ga.*, 296.

2. Claimant then moved to quash the *fi. fa.* and dismiss the levy, because the description in the mortgages was

"too vague, uncertain and contradictory," that description being in these words, "as an advance on my crops of cotton, corn, oats, etc., growing and to be grown in the year 1879, the same being now planted, to enable me to make my said crops, and I do hereby give them a mortgage on all my said crops, to take effect as soon as my said crops are planted." There were three Tift mortgages in evidence and these words are in all of them. The purpose was to create a lien by mortgage on all crops already growing or to be grown, and on that to be grown to fix the lien when planted. It is a little confused, but such is the meaning, and the description is sufficient, as it covers *all* the crops of that year. The crops levied on must have been all planted, as the earliest mortgage is dated the nineteenth day of April, and the other two in May. From the evidence, it is barely possible that a little cotton was planted afterwards. Certainly the execution should not have been quashed and the levy dismissed on this ground.

3. The evidence hardly required the court to charge that if some of the crop was not planted, it could not be *mortgaged*. As a general rule such is the law, as decided by this court. 55 *Ga.*, 543; 58 *Ga.*, 574. It is well settled as to sales. 55 *Ga.*, 586; 61 *Ga.*, 270. But a lien for fertilizers on a crop before planted is good. 59 *Ga.*, 773. And the same reasoning might possibly apply to some of these advances of the Messrs. Tift, as the reason is that the fertilizers are applied before the crop is planted. But in this case there is not proof enough to require the charge, or a new trial for its refusal.

4. The question, therefore, is narrowed to this, was the title to this crop levied on and claimed, in the defendant in execution or in the claimant, at the date of the Tift mortgages? Those mortgages are dated in April and May, 1879, and in the preceding December the defendant executed a bill of sale to the stock, the levy on which was dismissed, and also in that bill of sale used these words in

respect to this crop of 1879: "And whatever amounts may be left unpaid after the credits of the said property, is to be settled by note secured by lien on my crops of next year." The consideration is past indebtedness, and no valid lien could be made in December, 1878, upon an unplanted crop of 1879, to secure such past indebtedness under the decisions above cited. An effort was made, however, to do so, but after full knowledge on the part of the claimant of the Tift mortgages, as found by the jury. The paper, however, which was executed to carry out the 1878 stipulation, is not in evidence, but all about it rests in parol. It was, however, admitted to be junior to the mortgages of Tift & Co., and to have been a mortgage. If so, it conveyed no title; and if the lien it attempted to create could be set up in a claim case, it would be of no avail, because Crine had it executed with full knowledge of the Tift mortgages, and although these mortgages were attested by no witness, they were good against a junior mortgage with notice. 51 Ga., 268. There it was held so in the case of a mortgage on realty with but one witness, and a mortgage on personalty with no witness is in no worse condition. Code, §§1955, 1957. Besides, there was an attempt made to antedate this lien or it was antedated, and then not introduced in evidence, which looks fraudulent. On the whole, the verdict is right, and the judgment is affirmed.

Judgment affirmed.

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WEST vs. BLACK.

1. The verdict in this case is contrary to evidence. One who has made a valid conveyance of personalty cannot afterwards avoid the transfer by his mere admissions that the property is his, there being no question of fraud, and the debt under which the property is sought to be subjected, having been contracted after the transfer.
2. For a justice to admit a written conveyance of personalty in evidence before a jury, remarking that "the court thought the deed to

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West vs. Black.

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personalty was worth but little, but as the jurors were judges of the law and evidence, he would permit it to go before them for their consideration, if it was worth anything to them," was error, and was a good ground for *certiorari*.

Verdict. New Trial. Justice Courts. Before Judge McCUTCHEN. Whitfield Superior Court. April Term, 1880.

Reported in the decision.

S. M. WALKER; W. C. GLENN, for plaintiff in error.

S. P. MADDOX; D. W. HUMPHREYS, for defendant.

CRAWFORD, Justice.

A *fi. fa.* in favor of Black against Mark West was levied upon certain property as defendant's, which was claimed by Nancy West as hers, but upon the trial of the claim, the jury found the property subject. She carried the case to the superior court by *certiorari*, which the judge upon the hearing refused to sustain, and she excepted.

The grounds of error set up in the *certiorari* and relied upon before this court are—that the finding of the jury was against the evidence; and that the justice of the peace in ruling in certain testimony said that—"the court thought the deed to personalty was worth but little, but as the jurors were judges of the law and evidence, he would permit it to go before them for their consideration, if it was worth anything to them."

1. We have carefully looked into the testimony sent up in the record, and we cannot find enough to support the verdict, even under the liberal rule laid down by this court.

The defendant in *fi. fa.* made a deed on the fourth day of March, 1879, which was duly recorded on the following day, conveying and settling on Nancy West, his wife, and the claimant in this case, among other things, a certain wagon which he then owned. In the latter part of

the year this same wagon was sold for fifteen dollars, and the money reinvested, with the wife's knowledge and consent, in the property levied upon and claimed.

These facts were not disputed on the trial. There was no attempt to show fraud in the making of the deed of settlement on the wife, and not a debt shown to have been in existence against him at the time. The debt upon which the execution is founded, and for which, in a proper suit and against the right party, the property itself would be liable, was contracted nearly seven months after the making of the deed, and amounts to the sum of five dollars and fifty cents only, which of itself does not indicate fraud. Indeed, there is no testimony upon which to condemn this property except the sayings of the defendant in speaking of the wagon as his. It cannot be held that after one executes a good and valid deed without fraud, conveying property to his wife or another, that he can unsettle the title thus fixed, and bring it back into himself by speaking of it as his.

2. The remarks of the justice in admitting the deed in evidence was error, whatsoever he might have thought of it when the case was before him; after it had gone to a jury he should have expressed no opinion calculated to control their verdict. The case should have been remanded for a new trial upon the grounds of error herein set forth.

Judgment reversed.

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TURNER vs. THE GRANGERS' LIFE AND HEALTH INSURANCE COMPANY.

Though a subscription to the stock of an insurance company may have been induced by fraudulent representations, yet the subscriber cannot recover the amount paid, if there are creditors to an equal or larger amount on debts contracted after his subscription. As to such debts, the funds of the corporation, including his subscription, are held in trust for their payment.



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Turner *vs.* The Grangers' Life and Health Insurance Company.

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Corporations. Trust. Debtor and creditor. Before Judge UNDERWOOD. Floyd Superior Court. March Term, 1880.

Reported in the opinion.

HARVEY & HAMILTON, for plaintiff in error.

C. ROWELL, for defendant.

HAWKINS, Justice.

On the thirteenth day of December, 1877, Turner sued out an attachment against the defendant, returnable to Floyd superior court, and which was executed by service of garnishment, for the sum of two hundred and fifty dollars.

To this action the defendant, a foreign corporation doing business in this state, filed several pleas, and after the charge of the court hereinafter alluded to, the jury found a verdict for the corporation against the plaintiff. A motion for a new trial being made and refused, this writ of error seeks the review and reversal of the court below for so refusing the new trial.

It seems that the corporation was organized by the laws of Alabama, in 1874, and was doing business there and here, when, on the tenth day of August, Turner subscribed for two thousand five hundred dollars of the stock of said company—being twenty-five shares of one hundred dollars each. He was induced to subscribe for said stock by the statements of said company, who told him that one hundred thousand dollars had been subscribed and paid in cash at the home office at Mobile, Alabama. The agents were England & Covey, who also exhibited a pamphlet of the company to prove it had been paid in. They also represented that the loans and assets of the Georgia department were to be kept in Rome, in the Georgia department.

It will be seen that by its provisions the corporation was endowed with power to establish branch departments, and in pursuance thereof did establish several, one in the state of Georgia, in August, 1875, and plaintiff was a trustee, under the constitution, and was insured in said company, as required by its laws.

It was also alleged that the stock of said company was worthless at the time suit was brought—had before trial made an assignment of all of its assets and property—that at the time plaintiff subscribed one hundred thousand dollars had not been paid in in cash at the home office in Mobile, and that only the sum of eight thousand eight hundred and fifty dollars had been paid in by the stockholders of the home company in cash.

Plaintiff demurred to the pleas filed by the defendant, the corporation, which demurrer was overruled by the court, and the decision of the court upon the demurrer, and the charge in reference to the pleas must control this case, and make it unnecessary to allude to the voluminous evidence had on the trial.

The pleas were in substance, that after plaintiff's subscription and before suit brought, the company made contracts and incurred liabilities to and with other parties by issuing policies, and in other ways, to the amount of twenty-five thousand dollars, which sums are now due and owing, and appended a list of such creditors; but which cannot be paid if the plaintiff and others recover the sums paid by them on their subscriptions to the stock of the company.

On the trial, it appeared that there were debts of a larger amount than the one sued for, contracted after the subscription by the plaintiff, and the court charged the jury, that if they found from the evidence that the plaintiff is a shareholder, and paid two hundred and fifty dollars and ten per cent., he cannot, in this action, recover it back from the company, if there appear, from the evidence

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*bona fide* creditors of the company unpaid, to an amount equal to the claim sued for in this action.

Upon which the jury found a verdict for the defendant and a motion for new trial being overruled, Turner brings the case here.

The evidence was abundant that the company owed a debt after the subscription greater than the one sued for, and if the rule of law submitted by the court be correct, that ends the case.

We think as to all debts made by the corporation after the subscription, Turner was concluded, whether his subscription was induced by fraud or not, for as to such the funds of the corporation, including his subscription, were trust funds to pay the debts.

We do not say but in a proper case the plaintiff could assert the fraudulent representations to avoid his subscription; but we decide that, as to subsequent creditors, in this attachment proceeding, he cannot defend against the corporation as to creditors becoming such after his subscription. So we think the court did not err in refusing the new trial.

Judgment affirmed.

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THE BELLE GREENE MINING COMPANY *vs.* TUGGLE.

1. A motion to dismiss a bill in equity because there is a complete remedy at law comes too late when made at the trial term.
2. A bill alleged as follows: Complainant bought a tract of land containing two hundred acres, less one acre reserved by the vendor. The latter also reserved the right to all ores, minerals, etc., on the land, and the privilege of having the entire tract reconveyed to him or his assigns upon giving twelve months' notice and paying a certain specified amount. The defendant to the bill purchased the one acre and the privileges reserved by the original vendor, and began a mining business. It became necessary to carry on the work for defendant to have about five acres of the land contiguous to its mine; but complainant refused to convey it unless defendant would

take the whole tract. This defendant agreed to do upon the terms specified in the deed to complainant, and took possession of the five acres. Complainant had begun making improvements which he discontinued after the trade. At the time specified he offered to make the conveyance, but defendant failed to comply with its contract, and this bill was brought for specific performance.

*Held*, that there was equity in the bill.

3. Where written contracts are clear and unambiguous, parol testimony as to the understanding of the parties is not admissible.
4. Where one who agreed to purchase land and take title thereto at a certain time, and who actually made use of a part of it, failed to comply with the contract, the right of the vendor to specific performance is not lost by the fact that he remained in possession after such failure, being ready to make the conveyance when the contract should be complied with.
5. The verdict in this case could not be otherwise than it was.

Equity. Practice in the Superior Court. Specific performance. Contracts. New Trial. Before Judge SNEAD. Richmond Superior Court. October Term, 1879.

Tuggle filed his bill against The Belle Greene Mining Company to compel the specific performance of a contract by it to purchase certain land. The material allegations of the bill are stated in the second head-note. The main point of contest was whether the defendant was bound to buy the land or had the privilege of buying if it so desired, and whether complainant had so conducted himself as to be entitled to specific performance. The answer is not material to an understanding of the points decided; nor is the evidence, other than the following: The contract between the company and Tuggle was as follows:

"STATE OF GEORGIA—Greene County.

"I hereby permit the Belle Greene Mining Company, now operating in what is known as copper mine tract, in said county and state, and which Company is now at work on one acre, owned by said Company, to extend their occupation over five acres adjoining said one acre, in order that said Company may build, improve and occupy fully the said additional five acres with the view that said Company are from this

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date bound to pay the fixed price for the two tracts of land on which said copper mine is situated by the original deed, and by the time specified therein, namely, twelve months from this date.

"The within contract binds both the parties, that is, The Belle Greene Mining Company and the said William Tuggle.

"In witness whereof we have hereunto set our hands and seals, this 29th October, 1873.

[Signed]

WILLIAM TUGGLE,

W. H. WARREN,

*President Belle Greene Mining Company."*

Test, P. H. MELL, JR.

The following is an extract from the minutes of the company :

"BELLE GREENE MINES, October 29, 1873.

"A meeting of the president and board of directors was this day held, all the members being present. Various matters regarding the general interest of the Company and the progress of work at the mines was considered, and the following resolution was offered by Col. Clark, and adopted :

"*Resolved*, That the president at once proceed to purchase \* \* \* (certain named articles).

"Judge William Tuggle was formally notified to-day that the Company would take his one hundred and ninety-nine acres of land, and pay for the same by, or before, the expiration of twelve months from date of notice. The privilege was granted in writing by Judge Tuggle the use of five acres of ground adjoining the mines. Without further business the meeting adjourned.

[Signed]

W. H. WARREN, *President.*"

Complainant's son testified that he, as agent of his father, notified the company that complainant was ready to comply with his contract, and demanded or requested compliance by company. Defendant's president promised to comply. He said the company did not have the money, and if he had the means he would pay it himself ; said he hoped by the next fall to be able to meet the indebtedness.

It appeared also that after the twelve months expired Tuggle continued in possession of the land. He also testified to damages resulting from his ceasing to improve the place, etc. The original deed to Tuggle and numerous letters were in evidence.

The jury found for the complainant. Defendant moved for a new trial on the following, among other grounds:

(1.) Because the court erred in refusing to dismiss said bill on defendant's motion, for want of equity.

(2.) Because the court erred in refusing to dismiss said bill, upon defendant's motion, on the ground that, upon the facts alleged therein, complainant was not entitled to specific performance, and that no decree could be rendered upon the allegations therein contained.

(3.) Because the court erred in ruling out the following testimony of W. W. Clark and J. S. Hamilton:

Clark: "Witness cannot say, but thinks that the original, of which there is a copy attached (instrument of October 29th, 1873), was written by him. The object of the paper was to obtain possession of a few acres of land adjoining the land in Greene county, and was notice that The Belle Greene Mining Company would be entitled to the entire tract of land on which the mine was situated, by complying with the terms of the deed."

Hamilton: "The purpose of the instrument of October 29th, 1873, was to extend their occupation over five acres of land, adjoining the one acre owned by the company, in order that the said company might improve, build and occupy the additional five acres, or so much thereof as they might require for mining purposes, operatives' houses, stables, cribs, etc. I hardly know what the understanding was as to the effect of said paper by the parties signing it. On the part of the company, it was their intention not to be bound absolutely to take the land, unless the testing and developments should warrant the purchase."

Clark: "One of the managers and acting attorney said he could draw such a paper, and it was left with him to draw."

(Other testimony concerning the understanding of the parties was also offered and rejected).

(4.) Because the court erred in refusing to charge the

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jury as requested by defendant: "That if the jury believe that upon the expiration of the twelve months named in the instrument of October 29th, 1873, and the failure of defendant to pay or tender payment and demand a deed to the land, that the complainant treated said instrument as not further binding on him, and continued to occupy and rent the land as his own, then there can be no recovery by complainant in the action."

The motion was overruled and defendant excepted.

H. CLAY FOSTER, for plaintiff in error.

J. C. C. BLACK, for defendant.

JACKSON, Chief Justice.

1. The motion to dismiss the bill because the remedy at law was complete was made at the trial term, and came too late. To oust equity of jurisdiction on this ground and turn the complainant over to law, a demurrer must be filed at the appearance term, 60 *Ga.*, 627; 61 *Ga.*, 33.

2. But there is equity in this bill. Certain improvements contemplated and commenced by the complainant were suspended by the contract of defendant to buy his land, and damages could not be well ascertained in money. The vendor sold part of his land on condition that the vendee would take the other part at a fixed price at the end of twelve months. The trade was one. The consideration was for the entire land contracted for. On the faith of the contract—the entire contract—the defendant got part of complainant's land, valuable for mining, and then tried to get out of taking and paying for the part not so valuable for mining, but which it was constrained to agree to take in order to possess the four or five acres that the company really wanted. It seems to us to be a clear case for specific performance. The evidence is all in writing and beyond dispute. It appears in the written contract and on the minutes of the company itself, and where

such is the case specific performance will be decreed by a court of equity just as certainly as damage would be awarded at law, 17 *Ga.*, 142; 48 *Ib.*, 404; 51 *Ib.*, 47. Of course, if the law courts and remedies were adequate, and at the proper time defendant required complainant to go there without delaying him unnecessarily, there he must go and get the damage assessed, but if he be not pointed to that forum at the first term, he may abide in the court of chancery and there will get damage if adequate and ascertainable, or a decree for specific performance if such be the more perfect remedy for his wrongs.

3. The writings are full and unambiguous, and must mean what the words written indicate, and the court will give them that meaning without regard to the understanding of the agents of one party or both parties even. Parol testimony may explain written terms when doubtful, and if those terms do not show a clear meaning, the understanding of the parties may be shown outside to ascertain the meaning; but where the contract is not cloudy but all light, it were folly to attempt to make it shine by lesser lights. Where the sun is shining gas is useless.

Therefore the court was right to reject the parol testimony of Mr. Clark and Dr. Hamilton.

4. The court was right to refuse to charge as requested, even if the request had been in writing.

If defendant would not enter on and pay for the land, what was complainant to do? It would be strange to say that he forfeited the interest he had in the contract to give the other party possession on his paying for it, because when the other refused to go into possession or to pay for it, he kept it until it was paid for—offering all the time to give possession the moment the other side was ready to do its part.

5. Taking the case altogether, it strikes us as full of equity and the verdict and decree are demanded by the facts. Even if errors were made, they would not require the case to be remanded; for the result must be the same.



The president of the company would have carried out the contract individually if he could, and all sorts of promises were made to do so. There was no fraud on the part of complainant, but the trade was fairly made with all eyes open, and to such bargains all persons, artificial as well as natural, must stand.

Judgment affirmed.

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BUSH vs. THE STATE OF GEORGIA.

1. The verdict is supported by the evidence.
2. This court will not interfere with the discretion of the court below in refusing a continuance on the ground that a brother of the movant had gone to Alabama, and was an important witness, where no effort to secure his testimony or to find his whereabouts appears.
3. On a trial for burglary, the reasonable doubt which would acquit the prisoner is whether or not he is guilty of that offense, and not whether he is guilty of larceny from the house. A charge to the latter effect was properly refused.

Criminal Law. New Trial. Before Judge CRAWFORD.  
Muscogee Superior Court. November Term, 1879.

Reported in the decision.

THORNTON & GRIMES, for plaintiff in error.

H. BUSSEY, solicitor-general, by JOHN PEABODY for the state.

CRAWFORD, Justice.

The defendant in the court below complains that the judgment refusing him a new trial in this case should be reversed because :

1. The verdict is contrary to evidence and the weight of evidence.

2. Because the court refused a continuance on the grounds set out in his motion therefor.

3. Because the court erred in refusing the following request to charge: "If the jury should have any reasonable doubt as to whether the case made by the state against the defendant, is burglary or larceny from the house, the jury should give the benefit of the doubt to the prisoner and acquit him;" instead of charging, "if the jury should have any reasonable doubt as to whether the case made by the state against the defendant is burglary or not, then the defendant should have the benefit of the doubt, and you should acquit. Further, even though you may believe him guilty of larceny from the house, unless it was burglariously committed, you cannot find him guilty."

It is upon the failure of the court below to see in these grounds the legal right of the defendant to a new trial that we are called upon to pass.

1. Was the verdict contrary to the evidence? Murray, the prosecutor, testified in substance that he was a gunsmith, had a shop in Columbus in which he worked and kept guns. That on Friday night, the thirty-first day of October, 1879, the room was broken open and two guns taken therefrom. The person entered by one of the windows, there being three to the room, two of which he kept fastened all the time, except in the summer, with iron hooks and staples, and nails driven above the hooks, and the shutters fastened. The other or front window was only fastened with a nail over the sash, the shutters with hook and staple. He locked the door and fastened the window that he kept open when he shut up that night; the others were shut when he left; if they had been open he would have seen and noticed it. On the next day, Saturday, he noticed the nail gone from over one of the windows and the same unfastened, he looked around and missed two guns. He at once suspected Bush, the defendant, who had been about there the day before. He lived in Chattahoochee county. Mr. Calhoun, another wit-

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Bush *vs.* The State.

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ness for the state, testified that on Sunday Mr. England and himself went down to Chattahooche county to see if they could find the defendant, Bush, and see if he had the guns; they could not find him on that day. On Monday night following they secreted themselves near the house and upon some concerted plan created a confusion about the dwelling, which caused Bush to show himself at his hiding place in the woods not a great way off, and close by the spot where Calhoun had taken his position. Bush when thus discovered was captured with one of Murray's guns in his hands, and the other was found taken to pieces and hid behind a log. When Calhoun first captured him he asked him if he knew what was up, and he said yes, guns. As he was carrying him to Columbus he asked why he had taken the guns, he said he intended to carry them back.

None of the foregoing testimony was contradicted and nothing to weaken its legal effect, and the verdict was not therefore contrary thereto.

2. The next error complained of is the refusal to grant a continuance.

The motion was based on the absence of defendant's brother, by whom he said he expected to prove that he (his brother) had bought the guns stolen from a negro, and sold them to him. His brother had left for Alabama before his arrest and he had not been able to hear from him. He expected to be able to procure his testimony by the next term of the court.

The motion to continue was properly overruled because it did not show any effort to get his brother to be present at the trial. Nor that there had been even an inquiry made as to where he was, either by the witness himself or his friends or relations, and nothing had ever been heard of this proof until the motion to continue was made, although there was a preliminary examination.

The question of continuance must rest to a great extent where the law puts it, in the sound discretion of the judge

below, and unless there is a manifest abuse of that discretion, or a violation of some legal right of the party moving it, this court will not disturb his judgment.

3. As to the error complained of in ground three, we think that the request of counsel to charge was properly refused. The legal objection to the request was, that the defendant was being tried for burglary, and not for larceny from the house, and the proper charge was, that if they had any reasonable doubt as to his being guilty of burglary, then they should acquit. Any reasonable doubt that they might have had as to his being guilty of larceny from the house ought not to have entitled him to an acquittal. The law was given correctly as we think, and quite as favorably to the prisoner as he could have claimed it.

Judgment affirmed.

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DIXON *vs.* LAWSON *et al.*

The setting apart of a homestead under the constitution and act of 1868, even though subsequently confirmed in the bankrupt court, does not protect property from a judgment rendered prior both to the adoption of the constitution of 1868 providing for such homestead and the passage of the bankrupt law of the United States.

Homestead. Bankrupt. Judgments. Before Judge CRISP. Macon Superior Court. May Term, 1880.

Reported in the opinion.

THOMAS P. LLOYD, for plaintiff in error.

No appearance for defendants.

HAWKINS, Justice.

Plaintiffs in execution obtained a judgment at common law at the March term of Macon superior court, 1869,

upon a promissory note dated and made on the seventh day of March, 1861. The *fi. fa.* was levied on certain lands and a claim interposed by Matilda Dixon, the widow of said defendant in *fi. fa.*

On the trial of the claim it was agreed that the defendant, in his life time, to-wit: on the eighteenth day of March, 1870, had set apart to him a homestead in the lands levied on, and that in 1873 said defendant was adjudged a bankrupt, and the same lands were allowed him as his exemption in bankruptcy. It does not appear whether the wife and minor children were represented in the bankrupt court concerning the exemption allowed the husband in the same lands that had been set apart to the family in 1870, nor whether she claimed under the homestead laws of Georgia, or under the bankrupt law. The court, on the agreed facts, the case being tried before the judge without a jury, decided the property subject to the execution, and claimant excepted, and this is the complaint.

The contract being in existence prior to the homestead laws of Georgia, and the existence of the bankrupt law, the property was clearly subject to the lien of the judgment had thereon in 1869.

The case of *Bush vs. Lester et al.*, *adm'rs*, 55 Ga., 579, and cases therein cited, must control this case.

Judgment affirmed.

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#### SEISEL & BROTHER *vs.* REGISTER.

1. The verdict is not contrary to law or the evidence.
2. Where land was sold under a *fi. fa.*, which the sheriff delivered to the clerk with his deed to the purchaser, for the purpose of recording both, a sufficient foundation for the introduction of parol testimony as to the contents and entries on the *fi. fa.* is not laid by showing that neither the sheriff nor clerk can now find it; the purchaser should be inquired of concerning it, he being a witness in court.

New Trial. Evidence. Before Judge MERSHON. Dodge Superior Court. May Term, 1880.

To the report contained in the decision it is only necessary to add the following :

Plaintiffs sought to show that they did not hold the land as payment of the debt ; that it had been levied on and sold as the property of defendant under a justice court *fi. fa.*, and they had bought it. One of them was on the stand as a witness, but stated nothing about the possession of the *fi. fa.* It was shown by the sheriff and clerk that the former turned over the *fi. fa.* to the latter for record with the deed to the purchasers, that the deed was recorded, but the *fi. fa.* was not, and that neither the sheriff nor clerk could find it. Plaintiffs offered to prove the contents of the *fi. fa.* and its entries by parol. This was rejected, and is one of the errors alleged.

L. A. HALL ; R. K. HINES ; E. HERRIMAN, for plaintiffs in error.

No appearance for defendant.

CRAWFORD, Justice.

Seisel & Brother sued T. S. Register on an open account for about one thousand dollars. Register pleaded payment, and upon the trial of the case the jury found a verdict in his favor.

The plaintiffs moved for a new trial on the grounds :

1. That the verdict was contrary to law.
2. That it is contrary to the charge of the court.
3. Contrary to and without evidence to support it.
4. Contrary to equity and justice.

5. That the court erred in refusing to hear oral testimony as to the contents and entries upon a *fi. fa.* in favor of L. M. Peacock *vs.* T. S. Register, under which a store-house and lot were sold, and which house and lot were deeded by Register to Seisel & Brother, upon the showing made as to its loss.

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Seisel & Brother vs. Register.

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Grounds numbered 2, 3, 5, must control this case.

1. The defendant in this suit bought, as is admitted, \$2000.00 worth of goods from the plaintiffs for half of which he paid the money, and made a deed conveying his store-house and lot to the plaintiffs for the sum of \$1000.00, as he swears, in payment of the other half. This the plaintiff Seisel denies, and swears that the deed was only to *secure the payment* of the money, and *payment*, therefore, or *security*, is the controversy in this suit

The jury on the trial said by their verdict that the deed was *payment*, and this court is called upon to hold that they found contrary to evidence. We look upon the cold lifeless, written testimony as sent up in the record; they had before them, and looked upon, heard, knew and judged the living witnesses as each one came to the stand. The plaintiff swore the deed was only intended as *security*; the defendant that it was in full payment and satisfaction of the account. Neither was impeached. The jury decided that the truth was with the defendant, and the judge would not overrule their finding; neither should we. The defendant's testimony is sufficient to support the verdict. No other witness was present at the contract.

The second ground is that the verdict is contrary to the charge of the court.

The charge not being in the record, we cannot consider this ground.

2. The fifth ground of the motion for a new trial is in substance, that the judge refused to hear testimony as to the entries upon and the contents of a *fi. fa.* which had been lost, and under which the house and lot in dispute had been sold as the property of Register. On this ground the ruling of the judge was right, because the foundation was not fully laid without the testimony of Seisel, who was the purchaser and a party plaintiff as well as a witness in the suit.

Judgment affirmed.

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Ladd vs. McDonald.

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## LADD vs. McDONALD.

(JACKSON, Justice, was providentially prevented from presiding in this case.)

1. When a diminution of the record is suggested, and the clerk of the court below, in response to a rule *nisi* from this court, sends up the missing portion of the record, which covers evidence not contained in the brief as originally certified to this court, such addition constitutes a portion of the record and will be so considered.
2. Where the evidence was conflicting this court will not control the discretion of the court below in refusing a new trial.

Practice in the Supreme Court. New Trial. Before Judge MCCUTCHEN. Bartow Superior Court. July Term, 1879.

Reported in the opinion.

JOHN A. WIMPY; B. W. MURPHY, for plaintiff in error.

JAMES B. CONYERS; STANSELL & WOFFORD, for defendant.

HAWKINS, Justice.

This was a motion for new trial had and certified and sent to the last term of this court. A suggestion was then made of a diminution of the record, in that the brief of evidence, as agreed upon and approved, did not state correctly the evidence of one Peck, a witness in the case. The clerk, in response to a rule *nisi* from this court, certified and sent here the complete evidence of Peck as taken from the brief of evidence, and on the hearing now, plaintiff's counsel objected to the consideration of the same as a part of the record of the case.

1. Upon an examination of Peck's evidence, as contained in the original transcript, the following, which is contained in the new transcript, does not appear—seems



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Hnguley vs. Morris & Tumlin.

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to have been omitted in making out the original record.

"Witness put Styles Peck, T. H. Ladd and A. C. Ladd in possession of the property in 1872, and A. C. Ladd exercised the same sort of control and possession ever since."

We think the evidence thus sent up under the suggestion is properly a part of the record in the case.

2. The evidence shows that the property levied on was in the possession of defendant after judgment, and this put the claimant to her title if she had any.

It appears that the claimant, S. G. Ladd, was the wife of the defendant, and claimed that she had been in possession before and since the judgment, and, therefore, the plaintiff had not made out a *prima facie* case; but the testimony shows that the defendant was put in possession, with others, in 1872, and continued and exercised the same sort of control and possession up to the trial.

It is true there was conflicting evidence, but the jury were the proper judges of that, and having found the property subject, and the court below refusing a new trial, we see no error of law to justify a new trial.

Judgment affirmed.

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#### HUGULEY vs. MORRIS & TUMLIN.

1. T bought negroes and turned them over to M. It was agreed that the latter, being a skillful trader, should take charge of them, carry them to a point some distance off and sell them; that the money invested by T should be returned, the expenses paid and the net profits divided. M was allowed to purchase other negroes and draw on T for the price of them. No agreement was made as to losses. M sold a negro to H, using the firm name of M & T, and warranted soundness. The negro proving unsound, M took him back and gave a note signed with the partnership name for the amount to be paid back:

*Held*, that prior to the Code these facts would seem to make M & T partners, and as such liable on the note.

2. Under the facts above stated, if T was not a partner of M, the latter was certainly his agent in respect to the purchase and sale of negroes, and as such had power to bind him in respect to the soundness of the negro, and to settle a dispute relative thereto by giving the note; and T, or his estate (he being dead), is legally liable on the note so given. A verdict releasing T's estate was therefore contrary to law.

Partnership. Principal and agent. Contracts. Promissory notes. Before Judge HILLYER. Cobb Superior Court. November Term, 1879.

Huguley sued Morris & Tumlin on a promissory note for \$1,050.00. They pleaded (1), the general issue, and (2), that they had embarked in a speculation in negroes, which had been settled up before the note was given—in the nature of a plea of no partnership.

On the trial the evidence showed, in brief, the following facts: "In 1859 Morris and Tumlin agreed to enter into a speculation in negroes. Tumlin was to furnish the money necessary for buying. Morris was to conduct the buying and selling, he being a skillful negro trader. They were to sell, return Tumlin his money, pay expenses and then share the net profits. Nothing was said as to losses, because they did not expect any. Tumlin bought a number of negroes, which he turned over to Morris. The latter went to Columbus, (Rome being the starting point) bought and sold until the entire stock on hand had been disposed of, and then returned to Marietta and had a settlement with Tumlin. On this trip, in the firm name of Morris & Tumlin, he sold two negroes to Huguley, warranting their soundness. Shortly after the return and settlement of Morris, Huguley appeared, showed unsoundness on the part of one of the negroes and threatened suit on the warranty. Morris, still in the name of Morris & Tumlin, agreed to take back this negro, and not having the cash in hand, gave the note now sued on, signing it Morris & Tumlin. At the same time Huguley signed a

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*Huguley vs. Morris & Tumlin.*

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paper stating that he therewith returned the negro to Morris, or to J. S. Morris, one of the firm of Morris & Tumlin. In the contract between Morris and Tumlin, no limit of time was put on the continuation of the business, and Huguley had no notice of any termination or dissolution. Tumlin, in his testimony, stated that he did not consider that this made Morris his partner, but only his agent; also, that Morris had no special authority to sign this note or a similar paper.

Under the charge of the court, the jury found against Morris and in favor of Tumlin. Tumlin having died, Gray, administrator, was made a party. Plaintiff moved for a new trial on the following grounds:

(1), (2), (3). Because the verdict was contrary to law and evidence.

(4). Because the charge was misleading and confusing. The motion was overruled and plaintiff excepted.

JACKSON & LUMPKIN; GOBER & LESTER, for plaintiff in error.

D. & T. B. IRWIN; W. T. WOFFORD; A. JOHNSON, by A. T. AKERMAN, for defendants.

JACKSON, Chief Justice.

Suit was brought by Huguley against Morris & Tumlin on a joint and several note, signed Morris & Tumlin, for \$1,050.00. Morris put the signature, Morris & Tumlin, to the note. Tumlin pleaded that he did not sign it or authorize anybody to sign it for him. The reply was that Morris & Tumlin were partners, and therefore Morris had power to sign the note as he did; or that if they were not partners, Morris was Tumlin's agent in the business out of which the note sprang, and therefore he was empowered in law to sign Tumlin's name to it. The jury found a verdict for plaintiff against Morris, but in favor of Tumlin's administrator, who had been made a party, against

the plaintiff, who made a motion for a new trial on three grounds: first, that the court charged the law erroneously, second, that the verdict is contrary to law, and third, contrary to the evidence.

The exception to the charge is general, going to the entire charge without specifying particular errors, and cannot be considered in view of many rulings of this court. The question, therefore, is narrowed to the one point: Is the verdict contrary to law under the evidence? and that depends on this, was Morris authorized by law to sign Tumlin's name to the note and to bind his estate?

1. Did the facts make them partners? The partnership was formed in 1859, prior to any Code of Georgia, and to the definition of a partnership as to third persons therein given. Code, §1890.

Therefore the case of *Sankey & Shorter vs. Columbus Iron Works*, 44 Ga., 228, would not rule this, even if the point there decided covered this case; for that case arose after the adoption of the Code, and construed section 1890 of it, which makes either "a joint interest in the partnership property, or a joint interest in the profits and losses of the business, constitute a partnership as to third persons," and which declares that "a common interest in profits alone does not." The question is, what constituted a partnership in Georgia *as to third persons* before the Code? In *Buckner vs. Lee et al.*, 8 Ga., 285, this court, Judge NISBET delivering the opinion, said: "A community of property and an agreement to share in the losses and profits of a business, or community of losses and profits alone, will make the parties partners. But there may be a partnership without such community and agreement. There may be a partnership where there is no community of property, no agreement to share in the losses and profits, and no community of losses—that is to say, an agreement that one of the parties shall receive a proportion of the net profits of the concern, for money advanced for its use or property furnished for its use (as

here), will constitute a legal partnership as to third persons." The judge then goes on to cite Story on Part., §§66, 67, 68, 69, 70; Collier on Part., 28; 2 W. Blackstone, 928; 2 H. Blackstone, 235; 12 Conn., 69; 18 Wend., 175; 20 *Ib.*, 70; 17 Vesey, 204; 1 Rose, 91; Carey on Part., 11, note; 1 Hill, 526; 1 Iredell, 199; 38 Eng. C. Law, 495; and concludes that "if one is to receive a certain proportion of the profits—as one-third or one-half—as *profits*, he is a partner. If a *certain sum* is agreed to be paid out of profits, and the party does not look to that alone for payment, he is not a partner; but if *the sum to be paid is not fixed*, but may be increased or diminished by the amount or accidents of the business, then the receiver is a partner," and the ruling of the whole court is, that "upon an agreement between Lee and Everett that Lee should take certain negroes of Everett, and work them in a blacksmith shop, furnish all supplies, pay all expenses, and give Everett one-half of the net proceeds of the shop for the use of the negroes, that, as to third persons, they were partners."

It would seem that under this ruling, even if it were clear that in the case at bar Morris was to bear all expenses of this venture of the sale of the negroes Tumlin bought for him to sell, and yet Tumlin and himself were to share the net profits, they would be partners. But there is some confusion in the record on that point. Nothing is said as to losses, for the reason that neither anticipated loss in the sale of the slaves; and while one part of Morris' testimony, as given in the record, would seem to imply that he was to bear the expenses, Tumlin does not so swear, and there is certainly no express contract as to losses.

In *Perry vs. Butt & Banks*—14 Ga.—it is ruled that, "If three persons agree to sell goods, two of them contributing \$3000.00 each, and the other rendering his personal services, the profits to be equally divided after the payment of debts and expenses, and *with no stipulation as to losses*, whether this constitutes them partners or

not as between themselves, it does as to third persons." In that case, Judge LUMPKIN says: "The truth is in the absence of any express agreement to the contrary, the law, under this partnership in profits, devolves the losses likewise upon each and all of the partners. And that not only to the extent of the capital employed, but over and beyond it." And he cites Story's definition of partnership as a remarkable fact, that it says nothing about loss, but defines it to be "a voluntary contract between two or more persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a *communio of the profits thereof between them.*"

That able judge then adds: "State the present case to any plain man of reason and ordinary intelligence, that Butt, Banks & Tillinghast agreed to engage in trade in Columbus; that the two former, having funds, were to put in \$3000.00 each, and the latter, possessing superior skill and experience in business, was to give his personal services and attention, and that they were to divide the net profits equally, would he have any hesitation in pronouncing this a partnership? And if told that it might be so as to Butt & Banks, but not as to Tillinghast—that the law looked upon him as an agent merely—would he not be bewildered at such metaphysicality?" And then he confesses to the same inability himself to draw such distinctions, and adds:

"But whether a community of profits constitutes these persons partners *inter se* or not, it never has been questioned in any respectable quarter, that it would undoubtedly make them answerable to *third persons*, to whom they have held themselves out, and with whom they have contracted, as partners, and who cannot be affected by these secret contracts as between themselves."

Mr. Justice Story in his work on Partnership—§54—enumerates five distinct classifications wherein parties are partners as to third persons, the third of which is in these

words: "Thirdly, where the profit is to be shared between the parties as principals in like manner, but the loss, if any occurs beyond the profit, is to be borne exclusively by one party only." See also the same work from §53 to §70 inclusive.

It would seem therefore from the two cases cited from our own decisions in the 8th *Ga.*, and 14th *Ga.*, as well as from the above classification of Judge Story, that the facts of this case, occurring prior to the Code, make a partnership under Georgia law as it was before the Code. These facts in short are, that Tumlin bought and paid for certain slaves and turned them over to Morris to sell, who was to buy others and draw on Tumlin to pay for them, and then the net profits were to be divided equally between them, Morris putting in his skill as a negro trader against Tumlin's money, with no express agreement as to loss—the record making the testimony confused as to who should pay the expenses incurred in the transportation, board, etc., etc., of the slaves.

In my judgment these facts made them partners in 1859, and Morris had authority to sign the partnership name to the note.

2. However that may be, we are all agreed that Tumlin constituted Morris, if not his partner, at all events his agent in this venture of negro-trading—that he authorized him to sell the negro, the unsoundness of which was the consideration of the note sued, and that there being no notice of its termination to Huguley, the plaintiff, the agency continued in respect to the negroes sold by Morris up to the making of the note, and that he was empowered by virtue of the continuance of this agency to sign Tumlin's name to the note. A little more than a month after the sale of the negro, he was returned to Morris by the plaintiff, and Morris gave the note sued on for him, having a short time before turned over to Tumlin all the money the latter had embarked in the venture, as well as one-half of the profits, and having no funds with which

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Simmons vs. Camp.

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to pay the estimated loss to the plaintiff—*ex æquo et bono*, Tumlin having much the larger share of the money plaintiff paid for the unsound slave, ought to pay for him under the warranty ; and the only question is his liability on this note. Taking into consideration all the facts, the agency of Morris by reason of the partnership or of the contract, we think that this agent had the legal power to bind Tumlin in respect to the value of this slave, or the difference between his value if sound, and his value in his unsound condition, and to settle the dispute and give the note, and that his, Tumlin's, estate, on the facts made in this record, is legally liable upon the note. Story on Agency, 8th Ed., §73 and note—127 and notes—133 and note.

The verdict is therefore contrary to law and must be set aside, and a new trial granted.

Judgment reversed.

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SIMMONS vs. CAMP.

1. A judgment at law in favor of one surety against his co-surety on a draft for contribution, will not bar a bill by such co-surety to enforce the judgment for equitable reasons involving new issues and new parties which were not before the court in the common law suit.
2. While this may be the case with sufficient allegations and proper parties, under the present state of the pleadings, we cannot say that the court erred in refusing an order *nisi*.

Equity. Injunction. Before Judge ERWIN. At Chambers. Gwinnett County. June 9th, 1880.

Reported in the decision. See also reports of the same case when argued at the September term, 1878, and the February term, 1880, not yet published.

MYNATT & HOWELL ; WRIGHT & DORSEY ; A. C. KING, for plaintiff in error.

CLARK & PACE ; N. L. HUTCHINS, for defendant.



CRAWFORD, Justice.

A *fi. fa.* against the Gwinnett Manufacturing Company as principal, and Steadman, Camp and Simmons as indorsers, was paid off by Camp. He received in contribution from the assets of Steadman, who had gone into bankruptcy, one third of the amount so paid and to reimburse himself out of Simmons for his third of the amount so paid, he caused the *fi. fa.* to be levied upon his property. Simmons, by affidavit of illegality, arrested the sale and litigated all the questions made by this bill—except two which are set up in allegations therein contained, but not charged with such clearness and accuracy as to make them issuable, or to justify the prayer of the bill, which is evidently the granting of a new trial on issues made and settled by the former trials upon the illegality.

Stripped down to what we conceive to be the complete naked equity, he alleges, as we gather it, that Camp, the defendant in the bill, and his co-security, has received assets belonging to their principal, more than sufficient to pay that portion of the *fi. fa.* claimed of him. That he has kept and used them, and has them now, unless he has consumed and wasted them. Further, that Camp was a stockholder in the company, and that by the charter of the same, his private property is liable for the payment of the debts in proportion to the amount of stock owned when the debt was contracted, and that whatever amount he for himself, and as administrator for his father, who was also a stockholder, were bound to pay on this *fi. fa.* ought to be ascertained and paid before this complainant ought to be called on for contribution.

If it be true, as we construe this voluminous record, that these allegations are made, the questions, if they are clearly and distinctly made, can now be heard and considered by the court. We so hold, because the legal points heretofore litigated were exclusively directed to the question of Simmon's liability *on the draft itself for contribu-*

tion at all, and it was never fixed-until finally adjudicated by this court at its last term. That litigation was to ascertain whether he was liable by his indorsement thereon as surety, and also liable to his co-surety for contribution. That was adjudged adversely to him and is conclusive.

But now, since it is decided that *by his contract* he made himself liable, comes the settlement of that liability, and if on the settlement, there are equitable rights to be adjusted, such as are shadowed forth in the matters to which we have referred, and if they can be maintained on a trial, would the complainant not be entitled to the benefit thereof, as well as to a *perpetual injunction* against the *fi. fa.* itself? It is to be remembered in this connection, that in the litigation which has heretofore taken place, the complainant could not have secured this important equitable right; for in the language of the late Chief Justice WARNER, "this court is not committed, even by implication, to the doctrine that a common law court has jurisdiction to decree, by the verdict of a jury, a temporary injunction." *A fortiori*, a perpetual injunction would be utterly beyond the jurisdiction of such a court. 56 Ga., 627. Besides, it is by no means certain that the corporation itself would not be a necessary party, and that party cannot be made at common law.

Whether the allegations here considered can be definitely and truthfully made, and to what extent the rights of the parties would be affected thereby, are questions to be disposed of when they are made and brought before us for our judgment. At this time, and in this case, we hold that the judge below, in view of the frame of the bill and its prayer, committed no error in refusing an order *nisi* to the complainant. This affirmance however will not preclude the complainant's right to have these new questions adjudicated by a new bill, or by amending the present one, if it can be done, so as to present these issues in clear, positive and issuable allegations upon such equitable grounds as would entitle him to be heard.

Judgment affirmed.

## FLEMISTER vs. PHILLIPS. WEDINGTON vs. FLORENCE.

Under the constitution of 1877 and the act of 1878, a written waiver of exemption and homestead is good *inter se* without having the same alleged in the declaration or summons, judgment or execution, and is, after judgment, provable, *aliunde*, whether the lien of the judgment be general or special, and whether the waiver be written on the contract or obligation, or on a separate paper.

Homestead. Waiver. Judgment. Before Judge LESTER. Cherokee Superior Court. February Term, 1880.

Reported in the decision.

F. A. IRWIN; JNO. O. GARTRELL, for plaintiffs in error.

J. E. MOZELY, by brief; J. J. NORTHCUTT, for defendants.

HAWKINS, Justice.

This cause, with the one of George Wedington vs. Scott Florence were, by consent of counsel, argued together, and the decision of the court in this case will dispose of the other.

Exceptions are filed to the decision of the court below overruling the *certiorari*.

It appears that since the date of the constitution of 1877, the plaintiff in error made the contract sued on, with a waiver in writing of all benefit of the homestead and exemption laws of the state of Georgia, and suit was brought and a general judgment rendered against the defendant, whereupon a *fi. fa.* was issued and levied on the property, to-wit: a mule, cow, calf and other property. After the levy, Flemister applied for exemption under §2060 of the Code, of the property levied on, which was granted, and then interposed his claim to the

property, on the ground that the same was protected from the lien of the judgment. Upon the trial of the claim, plaintiff introduced his *fi. fa.* and proved defendant in possession of the property, and closed, when claimant submitted the exemption proceedings, which were regular.

The plaintiff then tendered in evidence the note upon which the judgment and *fi. fa.* were predicated, for the purpose of showing that in said note George Flemister waived and renounced in writing his exemption under the laws of Georgia as against the contract sued on, and also to show that said waiver was executed since the constitution of 1877 and the act of 1878 allowing general and specific waivers of exemptions, and also to show the note and judgment were before said exemption was applied for. To the introduction of which evidence Flemister objected, upon the ground that the waiver should have been sued on and appeared in the judgment and *fi. fa.* The court overruled the objection, admitted the evidence, and the property was found subject to the *fi. fa.* The case therefore presents the solitary question, whether, when A makes a contract since the constitution of 1877 and the act of the general assembly of 1878, and in writing waives and renounces his right of exemption, the plaintiff must, in a suit upon the contract set out the waiver and have the same appear in the judgment and execution. The suit upon the contract could at common law only properly end by verdict for the amount of principal, interest and costs, and the question of waiver could not arise on that issue—it could only arise when the plaintiff in *fi. fa.* sought to enforce the general lien created by the judgment against the homestead or exempted property, and the note was proper evidence, uncontradicted, to prove the waiver as between the parties. We think it unnecessary to incorporate the waiver in the pleadings, and that the court committed no error in so holding.

Let the judgment of the court below be affirmed.

## CRONAN vs. ROBERTS &amp; COMPANY.

1. The special jury provided for the trial of appeal cases from justice courts, by the act of 1878, is to be taken from the panels of traverse jurors, and not from the grand jury.
2. While generally a party cannot directly impeach his own witness, yet he may contradict him by proving the facts to be otherwise than as the witness has stated them.
3. The verdict is supported by the evidence.

Jurors. Witness. Evidence. New trial. Before Judge SIMMONS. Bibb Superior Court. April Term, 1880.

Reported in the decision.

WASHINGTON DESSAU, for plaintiff in error.

A. PROUDFIT; R. F. LYON, for defendants.

JACKSON, Chief Justice.

Roberts & Co. sued Mrs. Cronan in the justice court for balance due on two notes or acceptances, amounting to some fifty-seven dollars besides interest, for which judgment was rendered by the justice court; an appeal was taken by defendant to the superior court, where the jury returned a verdict for the same sum, and a motion for a new trial having been refused, the defendant excepted.

1. The main error assigned is, that the court erred in refusing to try the appeal by a special jury selected from the grand jury, on the demand of the defendant, but tried the case before a special jury selected from the traverse jurors.

The act of 1878-9, passed to carry into effect the provision of the constitution of 1877, in respect to appeals from justice courts to the superior courts, enacts that the case on the appeal shall be tried by a *special* jury as provided in the Code of 1873. Acts of 1878-9—153.

So that the question is, what special jury is provided for trial of civil cases in that Code? The act of 1869, codified in the Code of 1873, section 3932, provides that when parties do not agree to take one or the other of the panels of the traverse jurors, they shall strike alternately until twelve jurors are left, "which shall constitute the *special* jury to try the case." We think that the act of 1878-9 refers to this section rather than to section 3926, which has reference to special jurors selected from the grand jury. Certainly it would be very strange to give parties on the appeal from justice courts, involving amounts under one hundred dollars, greater privileges than in cases where thousands may be involved, and reason and good sense, as well as the convenience of the superior courts in practice, render the above construction of the act of 1878-9, the wiser and better ruling, even if there were doubt—of which it would seem there is none to be reasonably entertained.

2. The other point made is, that the defendants in error, having themselves offered the husband of plaintiff in error to show the debt was hers, by proving that she authorized the notes to be signed and recognized the debt, and having proved by him that she did not, could not impeach their own witness by contradicting him—that is, by proving by other witnesses that she did authorize the signature—and that it was her debt.

In *Skipper vs. The State*, 59 Ga., 63, the question was settled against the plaintiff in error. There it was ruled that "though generally a party cannot directly impeach his own witness, yet he may contradict him by proving the facts to be otherwise than as the witness has stated them in evidence," and that is the very question made here. The rule is founded in good sense in all cases, and especially where one calls the husband to testify against the wife it ought to be applied, for though nominally the witness is against the wife, his interest and feelings are all with her.

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Nor need surprise be expressed by the party calling the witness in such cases; for the impeachment is a mere incident and not direct. The other witnesses were called to prove the facts which the party failed to elicit from his first witness.

3. The verdict is abundantly supported by the evidence, and the new trial was properly refused.

Judgment affirmed.

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HARLOW vs. CLEGHORN.

1. The assignee of a *fi. fa.* made the following contract with the widow of defendant in *fi. fa.*, who was claiming dower, on condition that she would let the entire property levied on be sold: "I agree as assignee of a *fi. fa.*, Cadow, McKenzie & Co., vs. James Harlow, that in the event said land levied on by said *fi. fa.* comes to sale that Mrs. Harlow, widow of said James Harlow, deceased, shall have all said land may bring above \$600.00 and twelve per cent. interest from date hereof; also, if said Cleghorn, assignee of *fi. fa.*, becomes the purchaser of said land, he agrees to sell the same to Mrs. Harlow for \$600.00, at twelve per cent. interest from date hereof, due the first day of January, 1877. I, C. C. Cleghorn, further agree, if the \$600.00 is paid with twelve per cent. interest from date, to give her, Mrs. Harlow, control of *fi. fa.*, and also to give her control of *fi. fa.* after sale, and the credit due entered thereon, if not assigned before. This eighth day of February, 1876."

*Held*, that time was not of the essence of the contract, and that the right to redeem the lot did not expire on January 1st, 1877.

2. Concealment of material facts may, in itself, amount to a fraud, when from any reason one party has a right to expect full communication of the facts from the other, or where one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party, and yet keeps silent.

Contracts. Fraud. Equity. Before Judge UNDERWOOD. Chattooga Superior Court. March Term, 1880.

Reported in the decision.

DABNEY & FOUCHE, for plaintiff in error.

ALEXANDER & WRIGHT, for defendant.

JACKSON, Chief Justice.

Mrs. Harlow brought a bill in equity against C. C. Cleghorn, in which it is alleged that she was entitled to dower in certain land of which her husband died seized and possessed, and had made application therefor—that the land, except her dower, was subject to an execution which she was anxious to control—that she could have bought it for \$600.00, and not having the money, tried to borrow it from the defendant, but could not come up to his terms—that defendant afterwards bought the *fi. fa.* for \$300.00—told her that he then owned it and induced her to believe that he had paid \$600.00 for it, and that if she would let her dower sell with it he would do better for her than she had wished him to do when she tried to borrow the money from him, and made with her the following contract :

“GEORGIA,  
CHATTOOGA COUNTY. } I agree as assignee of a *fi. fa.*, Cadow,  
McKenzie & Co., vs. James Harlow, that in the event said land levied  
on by said *fi. fa.* comes to sale, that Mrs. Harlow, widow of said  
James Harlow, deceased, shall have all said land may bring above  
\$600.00 and twelve per cent. interest from date hereof; also, if said  
Cleghorn, assignee of *fi. fa.*, becomes the purchaser of said land, he  
agrees to sell the same to Mrs. Harlow for \$600.00, at twelve per cent.  
interest from date hereof, due the first day of January, 1877. I, C. C.  
Cleghorn, further agree, if the \$600.00 is paid with twelve per cent.  
interest from date, to give her, Mrs. Harlow, control of *fi. fa.*, and also  
to give her control of *fi. fa.* after sale, and the credit due entered  
thereon, if not assigned before. This eighth day of February, 1876.

C. C. CLEGHORN.”

“Test—H. D. C. EDMUNDSON,

The bill further alleges that Cleghorn bought the land, that she could not redeem it at the date the price became



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due, and defendant sold it for twelve hundred dollars, and prays that the contract be annulled for fraud, and if the land is in the hands of an innocent purchaser, that Cleghorn account to her for the amount he sold the land for over \$300.00, and the rent thereof for the two years which he held it. Discovery was waived, but the defendant, sworn as a witness, testified as follows:

C. C. Cleghorn, sworn: "In March, 1875, J. Harlow, Sr. and John Taylor told me they had agreed to pay Cadow, McKenzie & Co. \$600.00 for the *fi. fa.* They applied to me to advance the money or aid them to get it. I told them if I got some money from John Turner I would let them have it at the next term of court if they would secure me. When court came I did not have the money. I then said I would borrow the money and let them have it if they would secure me. They offered a mortgage on the land, which I declined, because I understood the land was incumbered by dower and other executions. I offered to take personal security and they did not give it. When all negotiations failed I told them not to depend on me any longer. Afterwards I went to Rome, and plaintiffs' attorney asked me to buy the *fi. fa.* I told him I would not give him more than \$300.00, and put in a claim I had on him for \$50.00 or \$60.00 in part payment. I told him I thought I could make more out of it. The *fi. fa.* was afterwards transferred to me on the terms I offered.

"Afterwards I met John Taylor at the post-office and he sought to negotiate with me about raising the \$600.00 to buy the *fi. fa.* I told him I then owned the *fi. fa.*, and would do better than the original plaintiffs had offered; that I would give them twelve months time. He said he would write to Mrs. Harlow, and we all afterwards met in Taylor's office, and he had drawn up a mortgage to secure me in the sum of \$600.00. Mr. Gamble was present and he drew up and I signed the contract in evidence. The parties present at the time were Gamble, Taylor, James Harlow, Sr., Gus Harlow, and Mrs. Harlow. I did not tell them

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what I had paid for the *fi. fa.*, and I expect they thought I had paid \$600.00 for it.

"Was present when the land was sold. Expected Mrs. Harlow to be represented there, but she was not, Did not say anything to suppress bidding. Did not say, nor hear any one say, the sale was to perfect title. Did not say he was the best friend of the widow who bid least. Think the land brought its full value at the sale. After the sale I gave Mrs. Harlow every opportunity to sell the land. Various persons came to me to buy the land and I always referred them to her, and I tried to sell it for her. She had until January 1st, 1877, to redeem the land by our contract. Just before the time expired they asked me if they could pay half, would I extend the time twelve months, and I agreed to do so; but they never paid anything. In the year 1877, Gus Harlow came to me and said they could not sell the land, and that I would have to take the land, and then he gave me up the contract between me and his mother.

"The sheriff put me in possession the day I bought it. It was rented by Mrs. Harlow that year for \$125.00. I made a new contract with the tenant. I got as rent in 1876 \$80.00, in money, and the balance was claimed by the tenant for repairs. In 1877 I rented it for \$125.00. In 1877, I sold the land to J. A. Starling for \$1200.00, payable in one, two and three years, with interest at 7 per cent. The only time I had any conversation with Mrs. Harlow about this matter at all, was at Taylor's office, when I signed the paper in evidence as the contract between us."

Cleghorn bought the land at the sheriff's sale, free from dower, for \$806.00. Its value at that time was variously estimated from \$600.00 to \$1200.00. There seemed to be an impression that the land was sold by the sheriff to perfect title, and thus may have been bought under its value; but the defendant said nothing to produce such an impression.

The jury found for defendant, and a motion for new trial on the ground that the verdict of the jury was contrary to law, equity and evidence, and that the court erred in construing the contract, having been overruled, the complainant excepted.

1. 2. The court construed the contract to mean that Mrs. Harlow was entitled to all the land might bring at the sale thereof by the sheriff, under the *fi. fa.* held by Cleghorn as assignee thereof, over six hundred dollars, with interest at 12 per cent. from February 8th, 1876, provided Cleghorn was not the purchaser at said sale; but if Cleghorn was the purchaser at said sale, then Mrs. Harlow had the right to become the purchaser of said land from Cleghorn, provided she should, on or before the first day of January, 1877, pay to said Cleghorn six hundred dollars with 12 per cent. interest from February 8th, 1876, and she did not have the right to demand of Cleghorn the excess of his bid over six hundred dollars if Cleghorn was the purchaser.

We think that time is not of the essence of this contract, and that the construction put upon it by the court that the right of complainant to redeem expired on the first day of January, 1877, is not the true intent and meaning thereof. If the contract was delivered up by the complainant, and she abandoned her right to sell the land or redeem it with knowledge of facts known to defendant, then Cleghorn was released; but whether Gus Harlow was her agent to surrender it does not appear. The jury may have been controlled by the construction put upon the contract by the court, and not by the surrender of the contract.

It will be observed, too, that the defendant bought the land under his own execution, and it cost him only the \$300.00 which he paid for it. The execution was for \$567.00 principal, interest to judgment \$24.80, and interest besides was due on it from September 3d, 1860, making due upon it some twelve or thirteen hundred dollars. He had the

advantage of all other bidders. He could bid the whole amount of the *fi. fa.*, principal and interest, and yet really bid but \$300.00, the price he paid for the execution. It would seem, therefore, that either the true meaning of the contract was that Mrs. Harlow was to have all over \$600.00 which the land brought, no matter who purchased it, Cleghorn or another, and in addition to this right was also to have the right to redeem if Cleghorn bought at the sale, or the defendant made a very one sided bargain with her. The bill is brought on the charge of fraud on the part of defendant, and such a construction of the contract, which seems to have been written by his counsel and at his instance, would perhaps give color to the charge.

Be that as it may, the defendant himself admits that *he thought* Mrs. Harlow and her friends with her, when the contract was made, thought he had paid \$600.00 for the execution. That was the sum at which it had been offered to them; that is the sum which they had tried to borrow from him to buy it for the widow; and though he believed they thought he had given that sum for it, he concealed that fact and drove the bargain, knowing that this woman was sacrificing her dower on a misconception of the truth which he knew and did not divulge.

Equity will not allow this to be done. Without going elsewhere for authority, our Code, §2635, declares: "Concealment of material facts may, in itself, amount to a fraud, when, from any reason, one party has a right to expect full communication of the facts from the other; where one party knows that the other is laboring under a delusion with respect to the property sold or the condition of the other party, and yet keeps silence."

It would seem that this law fits this case, and that the complainant is entitled to recover from the defendant all that he got for this land, over and above what it cost him, with reasonable allowance for interest and necessary expenses, or at least the value of her dower, with the rents, issues and profits thereon; unless with a full knowledge

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Morris vs. Root.

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of her rights and full information from the defendant of matters known to him and not to her, which operated on her mind in making the contract, she voluntarily surrendered her rights, or authorized it to be done.

Judgment reversed.

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MORRIS vs. ROOT.

1. Where the proof is that the plaintiff, having ceased to sell goods to the defendant, then sells them to his wife on her own credit, and so charges them, such a sale does not bring the previous account of the husband, which has stood for more than four years, within the statute of limitations.
2. Open accounts are barred after four years from the time when the right of action accrues. Accounts between merchant and merchant, which concern the trade of merchandise, have been made an exception to the rule, and to this have been added mutual accounts between others than merchants.
3. Where a sale of goods has been made, in the absence of proof of either contract or custom concerning payment therefor, the presumption is that the amount is payable on delivery.
4. The contract of a wife for goods sold to her on her own credit alone is not binding on the husband, though the seller may have expected her to get the money from her husband.

Husband and wife. Statute of limitations. Presumptions. Contracts. Before Judge LESTER. Cobb Superior Court. November Term, 1879.

Reported in the decision.

F. A. IRWIN; JOHN E. MOSELEY, for plaintiff in error.

RICHARD WINN; W. T. & W. J. WINN, by A. C. KING, for defendant.

CRAWFORD, Justice.

This suit was brought against the plaintiff in error upon an open account, the first item of which was purchased

January 11th, 1869, and the last May the 15th, 1877. The defendant pleaded the general issue and the statute of limitations. The testimony shows that the account on the plaintiff's books was charged against the defendant, Morris, to October 29th, 1873, and on April the 7th, 1874, and thence forward, to Mrs. Morris, the wife of the defendant. This change was made as Morris swears because further credit was denied to him. He is supported in this by the testimony of William K. Root, and it is not denied by the plaintiff himself, who only swears that he does not recollect positively refusing him credit. He further swears that "Mrs. Morris came to his store and wanted goods on a credit, and said that she would pay for them herself, or see that they were paid for, and that he made arrangements with her to let her have goods on a credit."

The jury, under the charge of the court, and on this evidence, found against the defendant for the full amount of the claim. He asked a new trial for the errors committed by the court and the jury, which was refused and he excepted. His grounds are:

1. That the verdict is contrary to law and contrary to evidence.
2. Because it was contrary to the charge of the court.
3. Because the court erred in the instructions given to the jury.

The three grounds may be considered and disposed of together, though not in the order named.

The charge of the court against which it is alleged that the jury found their verdict, was in substance—that if it appeared from the evidence, that any part of the account was charged to the wife, and she obtained the goods on her individual credit, and not that of her husband, then she and not the defendant would be liable. He further charged, that if it appeared from the evidence that more than four years had elapsed from the date of the last item charged to the defendant, and obtained on his individual credit before the bringing of this suit, then that the same

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*Morris vs. Root.*

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was barred by the statute of limitations, and the plaintiff could not recover.

The error complained of in the third ground of the motion for a new trial was the charge that if there was any item in the account which was not barred by the statute of limitations before the bringing of the suit, that it brought all the remaining items within the statute whatever might have been the length of time between them, and that mutual accounts were not necessary to establish that legal rule. Counsel requested him to charge that, except in cases of mutual accounts, the statute begins to run on the first day of January following the year in which the account is made; this was refused because there was no proof of custom or contract on the subject.

1. We think that the verdict of the jury was clearly contrary to evidence, and contrary to the charge of the court, and from the same as hereinbefore set out we lay down this legal principle: Where the proof is that the plaintiff having ceased to sell goods to the defendant, either because of his insolvency, or his being a bad paymaster, and then sells to his wife on her own credit and so charges them, he cannot claim that such sale brings the account of the husband, which has run more than four years, within the statute of limitations.

2. We think that the third ground of the motion for a new trial was well taken.

The evidence shows that no item of the account against the defendant was within four years, unless that charged to the wife was so considered, and even if that were sufficient to bind the husband, it could not run back and bring in all the items whatever might have been the length of time between them, as charged by the court. Again, the court instructed the jury that mutual accounts were not necessary to prevent the running of the statute where the last item was not barred.

We cannot concur in that view.

Open accounts are barred after four years from the

time when the right of action accrues. Accounts between merchant and merchant, which concern the trade of merchandise, have been made an exception to the rule, and to this have been added, latterly, mutual accounts between others than merchants.

3. As we send this case back for a new trial we rule upon two questions upon which there was controversy on the last trial. The first is that upon a sale of goods, and no proof is submitted as to the custom or contract about the payment therefor, the presumption of the law is that they are payable on delivery.

4. The second is, that the contract of the wife for goods sold to her *upon her own credit alone*, is not binding on the husband, though the seller may have expected her to get the money from the husband.

Judgment reversed.

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CECIL & THRASHER vs. GAZAN.

A deed to land, or a bill of sale to personal property, given to secure a debt, passes the title and protects the property against all liens created by contract or judgment thereafter, and this whether the wife's consent was previously obtained, or whether the conveyance was recorded.

Judgments. Lien. Registry. Before Judge HANSELL. Brooks Superior Court. May Term, 1880.

Reported in the decision.

D. W. ROUNTREE, by brief, for plaintiffs in error.

J. A. ALBRITTON, by brief, for defendant.

HAWKINS, Justice.

On November 7th, 1880, an attachment in favor of defendant in error against M. B. Young was issued and



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Cecil & Thrasher vs. Gazan.

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levied on two certain mules, to which plaintiffs in error on the same day filed their claim. At the September quarterly term, 1879, of Brooks county court, judgment was rendered finding the property aforesaid subject to the attachment, and an appeal was taken from said decision in the claim case. On the trial of the attachment case at the March quarterly term, 1880, of Brooks county court, a verdict was rendered and a judgment issued thereon against said property. At the May term, 1880, of Brooks superior court, the claim case came on to be tried on the appeal. The aforesaid attachment, with the judgment and levy entered thereon, was admitted in evidence over the objection of claimants' counsel for the reasons in the motion for new trial specified.

Plaintiffs in error relied on an instrument absolutely conveying the said two mules to them, there being no defeasance in or out of the instrument, and no bond for title or other stipulation for a reconveyance, and the possession and control of the mules remaining in the grantor, the said M. B. Young. The object of the conveyance was to secure a debt, and the note which was the evidence thereof was before the jury.

The conveyance and note, copies of which are given in the brief of evidence, were not recorded, and plaintiff testified on the trial that he had no notice whatever of said papers until after the levy of his attachment.

Under the charge of the court, which is set forth in the bill of exceptions, the jury rendered a verdict finding said property subject to the attachment.

A motion for a new trial on the grounds therein stated, was made and overruled, and claimants excepted.

The charge of the court was, that the bill of sale was intended by the parties to be a mere security for a debt, a mortgage lien, and did not pass title as against creditors, that it would not bind the mules so as to prevent them from being subject to the attachment unless executed with the formality of law, record, etc. Whatever may

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Johnson, administrator, *vs.* Flanders *et al.*

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have been the law heretofore, it is now settled by the adjudications of this court, that a deed to land, or a bill of sale to personal property, given to secure a debt, and so intended by the parties, passes the title and protects the title against all liens created by contract or judgment thereafter, and this is true, whether the wife's consent was previously obtained, or whether the deed or bill of sale was recorded. See 62 *Ga.*, 623, and cases there cited.

We therefore hold the court erred in its charge to the jury, and grant a new trial in the case.

Judgment reversed.

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JOHNSON, administrator, *vs.* FLANDERS *et al.*

A bill filed by an administrator against creditors of the estate, alleged, in brief, as follows : The intestate died in possession of both real and personal property. The administrator advertised some of the realty for sale, but claims were interposed and sustained. The balance, the title to which is in litigation, has been set apart as a homestead to the family. The administrator has sold the perishable property, and collected some of the accounts due the estate ; some others can be collected, and some cannot. A year's support has been allowed the family. Supposing the estate solvent, he paid some debts, but it has turned out to be insolvent. There are numerous debts pressing against the estate and claiming priorities and liens, some of which are very doubtful. One debt has been reduced to judgment, and the *f. fa.* levied on the land in litigation, as above stated. Other suits and complications will follow. The object of the bill was to marshal the assets, to enjoin the creditors from proceeding against him, and to obtain direction as to the mode of payment and of administering the assets :

*Held*, that there was equity in the bill, and it should not have been dismissed on demurrer.

Equity. Administrators and executors. Before Judge JOHNSON. Johnson Superior Court. March Term, 1880.

Johnson, administrator, filed his bill against Flanders *et al.*, alleging substantially the facts set out in the head-

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Johnson, administrator, *vs.* Flanders *et al.*

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note. On demurrer the court dismissed the bill, and complainant excepted.

E. O. BOSTICK; J. K. HINES, by Z. D. HARRISON, for plaintiff in error.

No appearance for defendants.

JACKSON, Chief Justice.

This bill was filed by the plaintiff in error to marshal the assets of an estate, and to enjoin the creditors thereof in the meantime from ruining the estate by a multiplicity of suits, and the enforcement of liens of various dignity. The estate is insolvent. There are claims of physicians' bills for services in last sickness from different doctors, and other liens of greater or less dignity. The immediate cause of its having been brought by the administrator seems to be that he had been sued and judgment rendered and execution levied on a tract of land, and the prayer of the bill is to stay this creditor as well as others who have sued or are threatening to sue. On demurrer the court dismissed the bill, and therein we think that the court erred. To adjust the several claims of creditors, to avoid a multiplicity of suits, to marshal the assets of the insolvent estate, to protect the rights of all the creditors, and to save himself from serious embarrassments and imminent danger of loss to him and his sureties, it was the duty and the right of the administrator to file the bill and settle the estate in equity. Code, §3146; 9 *Ga.*, 377; 14 *Ib.*, 323; 45 *Ib.*; 205; 41 *Ib.*, 630.

It will be observed that some debts may be of higher dignity than the judgments obtained in the lifetime of the intestate, and even as to those defendants the court may not have rightfully dismissed the bill; but in respect to the great body of the defendants it should have been retained beyond a doubt.

We do not think that the facts *in the bill*, which are

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Hall, administrator, *vs.* Spivey.

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true for the purposes of the demurrer, make such laches in the administrator as to deny him the right to this remedy. The answer cannot be invoked to aid defendant in this issue.

Judgment reversed.

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HALL, administrator, *vs.* SPIVEY.

H, administrator, obtained leave to sell certain land as belonging to the estate. Mrs. S claimed. In her affidavit she set out that the deceased, who was her father, had made a deed to her to 1,000 acres of the land sought to be sold; that, in consequence of dissatisfaction on the part of other members of the family, she agreed to accept 250 acres of another tract of land to which her sisters claimed title; that in consideration also that her mother, the widow, would relinquish all claims to an interest in the two tracts, she was to make a deed to her mother to the tract conveyed to her by her father; that she had complied with her part of the contract, but her mother had claimed dower in both places. She prayed that her mother be made a party and be compelled to deliver up the deed made to her by claimant for cancellation. The jury found a verdict for the claimant, reserving dower for the widow, and requiring her to deliver up the deed for cancellation:

*Held*, that the verdict was contrary to law, and inconsistent with itself. And further, the widow neither was nor could have been made a party so as to litigate concerning her title on the trial of the claim case between the administrator and the claimant.

Verdict. New trial. Claim. Parties. Before Judge LAWSON. Greene Superior Court. March Term, 1880.

Reported in the decision.

C. HEARD; P. B. ROBINSON, for plaintiff in error.

M. W. LEWIS & SONS, for defendant.

CRAWFORD, Justice.

The plaintiff in error as the administrator of R. B. Armor obtained leave to sell certain lands as the property of

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Hall, administrator, *vs.* Spivey.

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his intestate, which were claimed by Mrs. E. J. Spivey. In her affidavit she sets forth that the intestate, who was her father, had executed to her a deed to 1,000 acres of the land sought to be sold and known as the home place, in January, 1878, and which deed having been lost he made her another in the December following. That in consequence of the dissatisfaction prevailing with other members of the family after the death of her father, she agreed to accept two hundred and fifty acres of another tract of land to which her sisters claimed title, in consideration also that her mother, the widow, would relinquish all claims and interest in the two tracts; then she was to make her mother a deed to the land conveyed to her by her father, all of which has been done by her in pursuance of the agreement.

But the mother, notwithstanding the agreement and the deed, has refused to abide by the same, and in violation thereof has claimed dower in both places. Wherefore affiant prays that her mother, Mary S. Armor, may be made a party to the suit, and that a decree be rendered against her requiring her to deliver up the deed to the aforesaid home place, which she had made to her, to be canceled, as the same cast a cloud on her title, and the cancellation of which is necessary to her protection. She further prays that the copy deed attached as an exhibit to her claim affidavit may be established in lieu of the original deed.

After the introduction of the testimony and charge of the court, the case was submitted to the jury, who returned a verdict for the claimant, reserving dower for Mrs. Mary S. Armor, and requiring her to deliver up the deed from claimant to her for cancellation.

The plaintiff in error moved to set aside the verdict, and that a new trial be granted :

1. Because the verdict is contrary to law.
2. Because the verdict is contrary to evidence.

The judge upon hearing the motion overruled it, and this judgment is assigned as error.

Under the facts presented in the record then, the question is, was the verdict rendered contrary to law? This was a claim case, involving simply the question of title to this land; was it in the intestate or was it in the claimant? The jury found that it was in the claimant, and yet find that it was not, in that they reserved the widow's right of dower, which could not have been done except in the view that it was the land of the deceased, or that the claimant's title was charged with the right of dower, which is nowhere set up in her claim. It is therefore a verdict which the pleadings did not warrant, and which was inconsistent with itself.

Besides, if this were not so, the verdict further declares that Mrs. Mary S. Armor, who was not a party, and who could not have been made one in this suit, should deliver up a deed made by the claimant to her to be canceled. The jury, without requiring this deed of the claimant to Mary S. Armor to be delivered up and canceled, could not have put the title back into the claimant, and a verdict therefore against one who was not a party requiring that party to surrender any rights unheard, was contrary to law.

In view of the error on the first ground taken, and that the case is to be sent back for a new trial, we express no opinion on the second ground.

Judgment reversed.

### WELBORN *vs.* SHIRLY.

The office of a possessory warrant is to restore the possession of a chattel to a claimant from one who has obtained it by fraud, seduction, etc., or when the property has been taken without his consent. It deals with possession and not title. It is therefore not the proper remedy where the defendant obtained the chattel in dispute in exchange for another, even though false representations may have been made in the negotiation leading to the trade.

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Welborn *vs.* Shirly.

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Possessory warrant. Before Judge ERWIN. Habersham Superior Court. April Term, 1880.

Reported in the opinion.

C. H. SUTTON; CRANE & PASSMORE, for plaintiff in error.

BARROW & IRWIN, by GEORGE D. THOMAS, for defendant.

HAWKINS, Justice.

The plaintiff in error sued out a possessory warrant against Shirly, the defendant in error, for the possession of a certain mule alleged to have gone into the possession of Shirly by fraud.

On the trial of the cause the evidence was about as follows: Welborn was passing from near Toccoa to Rabun county, when about night Shirly overtook him and proposed to swap for his mule. Welborn's son went over to Shirly's house to look at Shirly's horse, and told his father he thought it would do to swap. Shirly told plaintiff that his horse was only eleven years old. Plaintiff said if his horse was over eleven years old he would not have him, and Shirley said he was not more than eleven years old. It was in the *night*. Shirly was to give twelve dollars to boot—eight dollars in a steer, and four dollars in any good trade. Next morning the horse's legs were badly swelled and he was stiff in his limbs. Welborn did not call for the steer or the four dollars—the horse was worthless.

Adolph Welborn, the son, corroborated the statements of his father; heard his father tell Shirly if the horse was more than eleven years old he would not swap for his horse; horse was worthless.

It was also proven that the horse was over twenty years old.

The defendant relied upon its being a fair trade. Said it was in the night and the son of plaintiff examined the horse and advised his father to trade. Defendant's son also swore it was as fair a trade as he ever saw and agreeable all around.

Upon the trial of the cause before the county judge, he awarded the possession to Welborn, when, on *certiorari*, the judge of the superior court, upon the facts, reversed the decision of the county judge, and this is the error complained of. It did not appear that Welborn offered to return the horse, or demanded the mule, or that Shirly was insolvent.

The only legal object of a possessory warrant is to restore the possession of a chattel to a claimant from one who has obtained it by fraud, seduction, etc., or when the property has been taken without his consent. The office is to deal with possession, and not title. In fact, the law inhibits inquiry concerning the title, and we apprehend the writ was not designed by the legislature to rescind every bad trade that parties make in the exchange of horses or other personal property because of fraud. It is a summary remedy, and in derogation of the common law, and must be construed strictly. The object was to quiet the possession of personal property, and its end to restore the property to the one having the *recent* quiet possessory right thereto, and not to settle the title or the *frauds* connected with the obtainment or retention of title. If A purchases a horse from B, and in the negotiations makes false representations, the remedy would be trover or an action for deceit, or on the warranty; but if A obtains the possession of B's horse by fraud, falsehood or false representations amounting to legal fraud, then his action would be a possessory warrant. In any case where the possession was obtained by fraud, seduction or without consent, the remedy by possessory warrant is proper, but in no other case, and in these cases the investigation must be confined to the question of possession alone.



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Dawson vs. Pennaman,

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In the case at bar it does not appear by the record upon what ground the judge put his decision.

It may have been upon the absence of sufficient evidence to show fraud in the trade, or that the defendant in error was solvent and responsible in damages, or the failure of the plaintiff to return the mule, or upon the ground that the trade was a fair one, and the evidence seems to be conflicting.

We therefore affirm the judgment of the court below.

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DAWSON vs. PENNAMAN.

Where there is a breach of warranty unmixed with fraud, the remedy is by suit on the warranty; but where there has been actual fraud mixed with deceit and corruption in an exchange of personalty, the party defrauded has his election to sue on the warranty or to bring trover for the property sold by him.

- (a) There being evidence to show such fraud, that question should have been left to the jury in a trover suit in a justice court; and the granting of a non-suit was good ground for a *certiorari*.

Fraud. Title. Warranty. Actions. Trover. Before Judge LAWSON. Putnam County. At Chambers. January 27th, 1880.

Pennaman brought trover for a mule against Dawson in a justice court. On the trial, the evidence in his behalf was, in brief, as follows: Plaintiff went to a livery stable where defendant had his mules and horses for sale, for the purpose of effecting a trade or swap with him. Plaintiff told defendant that he wanted a good family horse. He selected a horse which he proposed to trade for, but defendant said that horse would not suit him, as he would not work well, but that he (defendant) had a horse which would suit him. A horse was brought out which defendant said he would warrant to be a good, sound, family horse, and one which would suit plaintiff

and make him a good crop. The plaintiff proposed to have the horse ridden to see how he moved ; but defendant said there was no use, to come on and sign the note for it, that it could be tried as well afterwards ; that the horse might be a little stiff from standing in the stable, but he warranted him to be a good, sound, family horse. They traded, plaintiff giving a mule and a note for \$55.00 for the horse. He traded on defendant's warranty, and without any knowledge of his own. He rode the horse home, and on arriving there, found it stiff in one hind leg ; next day it was stiff in two legs, and a little later was down and could not get up. Plaintiff offered to rescind the trade, which defendant declined to do. Plaintiff then brought trover for the mule.

On this testimony the justice granted a non-suit. Plaintiff carried the case to the superior court by *certiorari*, which was sustained and defendant excepted.

W. B. WINGFIELD, for plaintiff in error.

No appearance for defendant.

JACKSON, Chief Justice.

This case came before the superior court on a writ of *certiorari*, and the superior court having sustained the *certiorari* and remanded the case for another hearing in the justice court, the plaintiff in error excepted and assigns for error the judgment sustaining the *certiorari*. The suit was for a mule, wherein plaintiff in the justice court was non-suited on the ground that his testimony was insufficient *prima facie* to make a case to go to the jury. It seems that the horse was warranted to be sound, and the justice held that the action should have been upon the breach of warranty, and not in trover for the mule ; but the evidence is to the effect that the plaintiff below was cheated and defrauded badly out of the mule, and hence no title passed under the Code, and the repeated

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Tucker vs. Cox.

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rulings of this court, and therefore the superior court was right in sustaining the *certiorari*, and awarding a new trial in the justice court. Code, §§2533, 2751, 3178.

Unquestionably the fraud which, under section 2633, voids a sale, and consequently does not permit title to pass, must be actual fraud, mixed with deceit and corruption, and not merely legal or constructive fraud; but in this case there is evidence to show such actual fraud, and the proper tribunal should have passed upon it, and the plaintiff should not have been non-suited. It is true that if there had been a warranty unmixed with such *actual* fraud, the plaintiff's remedy would have been a suit on the breach of that warranty; but where there is actual fraud, so that no title passed, he had his remedy or his choice of remedies, either to sue for the property, the title to which never passed from him, or on the breach of warranty for damages. The superior court was right, therefore, to sustain the *certiorari*, and remand the cause for another hearing on the merits.

Judgment affirmed.

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TUCKER vs. Cox.

Where there is an express contract for rent payable in specifics, a distress warrant lies; and where the value of the specific is subject to fluctuation, and must be established by proof on the trial, the statement in the distress warrant of the amount of the specific due, and that it is supposed to be of a particular value, is sufficient.

Landlord and tenant. Distress warrant. Pleadings. Before Judge PATE. Washington Superior Court. May Adjourned Term, 1880.

Reported in the decision.

H. D. D. TWIGGS; E. S. LANGMADE, for plaintiff in error.

JAMES K. HINES, for defendant.

CRAWFORD, Justice.

D. H. Tucker sued out a distress warrant against G. W. Cox, in which he claimed that the said Cox was "justly indebted to him in the sum of twenty-five hundred and thirteen pounds of lint cotton, for rent for the year 1879, said rent being now due and unpaid, the value of said amount of cotton supposed to be two hundred and seventy-five dollars."

A counter-affidavit was filed denying that any part of the rent distrained for was due, which caused the papers to be returned to the next succeeding term of the superior court for the county, and at which term the defendant demurred to the said affidavit—

1. Because it was insufficient in law.

2. Because no definite value is given to the specifics in which the rent was due.

The court, after argument, sustained the demurrer and dismissed the warrant, to which ruling the plaintiff excepted, and assigned the same as error.

The single question therefore made for this court is the sufficiency of the affidavit. In 40 *Ga.*, 520, it was held that, "Nothing is required by this act (§4082 Code) but that it shall be for rent and due. The statute does not say it shall be by express contract, but simply due. It does not say it shall be for a sum certain, but simply that it shall be due for rent. It is in fact nothing but a mode of commencing a suit for a debt due for rent. . . . It appears absurd to insist that the distress can only issue when the rent is for a sum certain, expressly agreed upon. The statute does not so require. It simply says rent due, no matter whether it is a fixed sum or due on a *quantum valebat*."

In 39 *Ga.*, 14, it was held that "A landlord may collect his rent by a distress warrant, even though the rent is payable in specifics, the value of which is not fixed by the contract."

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Cooper, administrator, *et al. vs. Lockett.*

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The view which we take of this case is, that when there is an *express contract* for rent between the parties, payable in specifics, a distress lies, and where the value of that specific is subject to fluctuation, and must be established by proof on the trial, that in such a case the language used by the plaintiff in his affidavit is sufficiently definite and certain to authorize a distress warrant to issue.

The ruling of the court was therefore erroneous and must be reversed.

Judgment reversed.

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COOPER, administrator, *et al. vs. LOCKETT.*

1. The amendment was proper; it did not add a new cause of action, but simply gave more certainty to that already brought.
2. Discrepancy between attachment and levy as to whose possession property was in, immaterial after replevy.

Amendment. Attachment. Levy and sale. Before Judge CRISP. Sumter Superior Court. October Adjourned Term, 1879.

Lockett sued out an attachment against Cooper, as administrator of the estate of Braswell, and W. L. Fowler, on the following note:

"\$145.00.

AMERICUS, GA., January 22d, 1876.

"On the first day of November next I promise to pay to order of myself at Bank of Americus, \$145.00, with interest at twelve per cent. per annum from date if not promptly paid, and ten per cent. of the amount for attorneys' fees for collecting, which the parties to this contract agree to pay, and they waive and renounce their right to homestead and exemption in their property as against this contract, for value received, and I hereby give a mortgage on the gray mule for which this note is given to secure.

(Signed)

J. P. COOPER, adm'r.

W. L. Fowler."

"Credited November 24th, 1876, \$50.00."

The affidavit alleged that the note was given for a mule,

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Cooper, administrator, *et al. vs.* Lockett.

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and that it was then in the possession of Cooper and Fowler.

At the appearance term plaintiff filed a declaration in the ordinary statutory form of complaint.

The remaining facts, so far as material, appear in the opinion.

GUERRY & SON, for plaintiffs in error.

E. G. SIMMONS; B. P. HOLLIS, for defendant.

HAWKINS, Justice.

In this case a complaint in attachment and at common law were called for trial at the October adjourned term of the superior court of Sumter county, when the defendants demurred to plaintiff's declaration, and moved to dismiss both on the ground that there was no sufficient cause of action set forth in said declaration, because the note sued on was defective and of no effect in this, that the said note was made "payable to the order of myself," and there was no indorsement thereon by either of the defendants or any other person whatever; and the attachment and levy on the further ground, that while it was alleged in said affidavit that the mule, the consideration of the note, was purchased by and was in the possession of John P. Cooper and W. L. Fowler, the levy was made upon a mule as the property of J. P. Cooper, as administrator of Braswell, deceased, and not otherwise; and also on the ground that the declaration did not correspond with the levy and affidavit, or the latter with each other. The court overruled all the grounds of demurrer and objection to each and all of said papers, and passed an order allowing plaintiff to amend his declaration in attachment by charging that the note attached to his original declaration was signed by J. P. Cooper, administrator, and W. L. Fowler, and was given for the purchase money of the mule mentioned in said note; since the making of said note said J. P. Cooper and said W. L. Fowler have re-

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Cooper, administrator, *et al.* vs. Lockett.

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cognized their obligation to pay this note, and said Cooper has since the signing of said note paid to plaintiff the sum of fifty dollars, and directed same to be credited on said note, which was done; and that when said note was signed by said parties it was delivered to said plaintiff, and the plaintiff delivered the mule at the time said note was so made and delivered, and he says further that he cannot read, that it was the intention of all the parties to make the note payable to plaintiff, and plaintiff accepted and received the said note, believing that it was a note payable to him, and that the mule mentioned in the note is the same levied on, etc. Defendants having filed their plea, the case was passed to the subsequent adjourned term of the court in January following. Defendants filed exceptions *pendente lite* to the judgments of the court overruling their several demurrers and motions, which were approved and ordered of record. At the subsequent adjourned term the case was tried. Plaintiff tendered his note referred to in evidence, which was objected to on the ground that the same was defective and not a sufficient cause of action. The court overruled defendants' objection, and allowed the same to be introduced in evidence. The jury returned a verdict for plaintiff, and judgment was entered thereon; whereupon defendants filed their bill of exceptions assigning as error said judgment of the court allowing the introduction of said note as evidence, and to all the rulings of the court set forth as error in the exceptions *pendente lite* heretofore referred to.

1. We think the court committed no error in allowing the amendment; it was not adding a new and distinct cause of action, but expressed the cause of action with more certainty, it appearing in the body of the paper sued on that the same was given for a mule, and also was a mortgage upon the mule. See Code, §§3479, 3480.

2. As to the discrepancy between the attachment and the levy, that the attachment described the mule as in the possession of Cooper & Fowler, and the levy described it as

being in the possession of Cooper as administrator, we deem immaterial after replevy.

Judgment affirmed.

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THE MACON AND WESTERN RAILROAD vs. MEADOR BROTHERS.

1. On November 12th a railroad received certain boxes of tobacco to be carried from Atlanta to Macon; they reached the latter place on November 15th, and under an agreement between the consignee and the carrier, they were set aside by the latter in its depot to be sold and the proceeds used to pay past due freights, it being agreed that the balance, if any, should go to the consignee. He did not receive the boxes and then turn them over, nor did he assign the bill of lading, nor was the freight paid. On December 12th the consignors sought to stop the boxes *in transitu* and failing to obtain them on demand, sought to recover against the carrier:

*Held*, that no actual delivery had taken place so as to prevent a stoppage *in transitu*.

2. Can a carrier purchase the title of a vendee and set it up against the vendor's right of stoppage *in transitu*? *Quære*.

Carriers. Railroads. Vendor and purchaser. Stoppage *in transitu*. Before Judge SFEER. Bibb Superior Court. October Term, 1879.

Reported in the decision.

LANIER & ANDERSON, for plaintiff in error.

BLOUNT & HARDEMAN; HILL & HARRIS, for defendant.

JACKSON, Chief Justice.

Meador Brothers shipped from Atlanta to Macon certain boxes of tobacco consigned to Carlos. The Macon and Western Railroad Company received them as carriers, about the twelfth day of November, 1872, and they arrived in Macon about the fifteenth, and shortly thereafter



the treasurer of the company, Brantley, under an agreement and order from Carlos, as he testifies, set the goods or tobacco aside in the depot to be sold by the company to pay past freights, and balance to Carlos, if any. After this transaction, Meador Brothers instituted proceedings to stop the goods *in transitu*, Carlos having been forced into bankruptcy, and the question is whether on the twelfth of December this tobacco had been so delivered into the possession of Carlos, as to defeat the right of the vendors to stop their transit to him, and to vest in the carrier a right to exact his indebtedness for freight on other goods out of these goods before the vendors could be paid?

Our Code declares that the right of stoppage *in transitu* continues until the vendee obtained *actual possession* of the goods. In the ordinary signification of those words, there is no evidence in this record that the consignee ever did obtain the possession. He did not go with Brantley and have these boxes set apart, but gave orders in respect to goods consigned to him generally, and perhaps an order designating these boxes, though that appears uncertain, looking at all the testimony in the record. They were set apart only by being moved from one part of the carriers' warehouse to another, according to Brantley's testimony, without the possession having been actually at all in Carlos. This possession was only constructive. The boxes were only moved from one part to another part of the same apartment where the company had deposited them for the consignee, and where its freights were commonly stored until delivered to the consignees. The bill of lading had not been delivered up or transferred, nor had the freight on these boxes been paid. Under these circumstances we cannot see actual possession in Carlos, or actual delivery to him, or to anybody for him. Brantley was acting for the road, and was its agent.

Besides, it is very questionable whether the carrier can buy the vendee's title as against the vendor's right of

stoppage *in transitu* from the vendee, and set it up so as to defeat that right under our Code. Section 2076 enacts that he cannot dispute the title of the person delivering the goods to him, by setting up adverse title in himself, or a title in third persons, which is not being enforced against him. See also Hilliard on Sales, 301.

However that may be, we think that our Code contemplates actual delivery and possession, as distinguished from constructive possession, and there was no actual delivery or possession here.

Indeed, at common law such a delivery as this is would hardly avail to defeat the vendor's right to stop the goods *in transitu*. Hilliard on Sales, 301. 3 Bos. & Pul., 49.

The tobacco was sold on credit. Carlos was put in bankruptcy, and therefore was not able to pay for the tobacco, and was insolvent in the meaning of §2643 of the Code, which declares that where credit is given and the insolvency of the purchaser is made known to the seller, he may still exercise the right to stop the goods before they reach the consignee. See also Code, §2650.

We think that the verdict of the jury for the plaintiffs is right under the law and evidence on the case made, and that the court did not err in overruling the motion for a new trial.

Judgment affirmed.

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POWELL vs. THE STATE OF GEORGIA.

1. The verdict is not contrary to law or the evidence.
2. An objection that the judge, in a murder case, failed to amplify his charge on the subject of reasonable fears will not necessitate a new trial, where it appears that no request to charge on that point was made, and that the charge as given contained substantially the amplification desired.
3. Counsel may read and comment on the law to the jury in a criminal case. During the argument he may invoke the opinion of the court upon any principle of law involved in the case, and the court may rule upon it in his charge, or at the time, if his mind is settled in regard to it.

4. Where a motion for new trial was set for a hearing during a certain session of the superior court, and was heard at that time, the court had the right to withhold its decision for further consideration without any order for that purpose. In the present case, moreover, the decision was rendered during the term.

Criminal Law. Charge of Court. Practice in the Superior Court. New trial. Before Judge PATE. Telfair Superior Court. April Term, 1880.

Reported in the decision.

ROBERTS & DELACY; C. C. SMITH; WILLIAM MCRAE:  
L. A. HALL, for plaintiff in error.

R. N. ELY, attorney-general; THOMAS EASON, solicitor-general, by Z. D. HARRISON, for the state.

CRAWFORD, Justice.

Charles Powell, having been found guilty of murder, moved the court below to grant him a new trial, which was overruled, and he alleges this ruling as error, because the jury convicted him contrary to evidence and law, contrary to the charge of the court, and because other errors were committed during the trial in the charge and afterwards.

1. We have given to this case that consideration which its importance demands, and that too whilst it might have been dismissed on motion. We have reviewed the testimony set out in the record, to ascertain whether or not the plaintiff in error was found guilty contrary to evidence and law.

It appears that the deceased and the accused were at the store of a Mr. Bullard, in McVile—that the prisoner was boasting of what he intended to do at a ball which was to take place in the neighborhood that evening, to which the deceased replied in words of kindly caution, that seem to have given the gravest possible offense to

the prisoner. The deceased then left him and went over to the store of a Mr. Durden, where the prisoner followed him and renewed the conversation, which soon led to mutual curses, and prisoner said to the deceased who was seated on a bench: "You are a G—d d—n s—n of a b—tch," deceased arose and said, "don't call me that, I give it to no man and don't want any man to give it to me," at the same time advancing towards prisoner, who stepped back a few feet, drew his pistol and fired upon him twice, the second of which shots took effect in deceased's right side, who staggered back, fell and in a few minutes expired. Some effort was made to show that the deceased had one hand behind him, indicating that he had a weapon in it, but the eye witnesses to the transaction testify that he did not appear to realize the danger in which he stood until the fatal shot was fired. Some threats were sworn to, but evidently unbelieved by the jury, and even if they had been, they were insufficient under the *res gestae* to have justified the homicide.

It is complained that the jury found contrary to the charge of the court as set out in the third ground of error, and which is as follows: If the defendant, at the time of the killing, was acting under the influence of a reasonable fear, it was justifiable homicide; admitting this to be so, it should not arrest the finding of the jury as the charge was more favorable to the accused than the law authorized. And besides, even as it was, the jury, who were the judges, by their verdict say that he was not acting under the influence of a reasonable fear.

2. Another ground of error is that the judge did not amplify that part of his charge upon justifiable homicide, by adding that if the defendant really believed that his life was in danger, and acted under the influence of fear, then it would be justifiable homicide. The judge certifies that there was no request to charge further upon that branch of the law, but that he did charge that if circumstances at the time appeared to the prisoner to be such as

to excite the fears of a reasonable man, and that he acted under those fears, and not in a spirit of revenge, then it would be justifiable homicide. If there were any objection to the charge as set out in this ground, it was certainly removed by the further charge as here certified to have been amplified and explained.

3. The fifth ground of error as corrected by the judge is, that whilst counsel for the prisoner was arguing the case, he called the attention of the court to this principle laid down in the head-note of the case of *Grainger vs. The State of Tennessee*. "If a man, though in no great danger of serious bodily harm, through fear, alarm or cowardice, kill another under the impression that great bodily injury is about to be inflicted upon him, it is neither manslaughter nor murder, but self-defense." In reply to which the judge stated in the presence and hearing of the jury, that this was not the law of Georgia.

This court has ruled that counsel may read and comment on the law to a jury in a criminal case, and we reaffirm that ruling. Counsel may, during the argument, invoke the opinion of the judge upon any principle of law in the case, and it may be given at the time, or in the final charge; if, however, the mind of the judge is made up and settled, we see no reason why he may not announce it at the time, and in the presence of the jury.

4. The last ground of error complained of is, that the order for the hearing of the motion for a new trial set the same "to be heard at any time during Pulaski superior court, to-wit: the second and third weeks in May next, and be determined during said Pulaski superior court," and that although the said motion was argued during the first week of the court, no judgment was pronounced until the twenty-fifth day of the said month, and that no order was taken extending the time within which to pass upon the motion. By the order taken it was provided that the motion was to be determined during the court, and the judge certifies that the court was in session when the

judgment was rendered, but if it were not, and the motion had been argued at the time named, it was lawful for the judge to hold it up for further consideration without an order. *Curia advisari vult* is an inherent right existing in the court. Moreover, we can see no advantage to the plaintiff in error to have his motion for a new trial fall, when it would leave the original judgment of force and himself under the sentence of death.

Having examined and considered all the grounds of this motion for a new trial, we are unable under the law to grant it, and therefore the judgment stands affirmed.

Judgment affirmed.

#### FAW vs. MEALS.

1. Where an instrument is free from ambiguity, the construction thereof is solely for the court.
2. The following obligation creates an individual liability on the part of the maker: "Received of Mrs. Julia B. Meals, by the hands of Mrs. Mary W. Phillips, \$900.00, which said sum of money I obligate myself to use in running capital of the Marietta mill, and keep the same in money, stock, material and paper, not subject to the debts of the mill. I further obligate myself to pay Mrs. Meals twelve and one-half per cent. interest on the same, payable monthly. I further obligate myself and promise to pay Mrs. Meals as much as \$500.00 of the principal sum on or before May 1st next, if called upon, the remainder due and payable twelve months after date, at which said time and date I promise to pay Mrs. Meals, or bearer, whatever of said principal sum and interest which may be due and unpaid.

(Signed)

E. FAW,

"Agent of the Marietta Paper Mill Company."

Contracts. Construction. Before Judge LESTER. Cobb Superior Court. March Term, 1880.

Reported in the opinion.

D. & T. B. IRWIN; F. A. & R. C. IRWIN, for plaintiff in error.

W. T. & W. J. WINN, by A. C. KING, for defendant.

HAWKINS, Justice.

On the twenty-first day of January, 1869, the plaintiff in error executed the following instrument :

“MARIETTA, GA., January 21st, 1869.

“Received of Mrs. Julia B. Meals, by the hands of Mrs. Mary W. Phillips, nine hundred dollars, which said sum of money *I obligate myself* to use in running capital of the Marietta mill, and keep the same in money, stock, material or paper, not subject to the debts of the mill I further obligate myself to pay Mrs. Meals twelve per cent. interest on the same, payable monthly. *I further obligate myself and promise* to pay her as much as five hundred dollars of the principal sum on or before the first day of May next, if called upon, the remainder due and payable twelve months after date, at which time and date I promise to pay Mrs. Meals, or bearer, whatever of said principal sum and interest which may be due and unpaid. (Signed) E. FAW,

“Agent for the Marietta Paper Mill Company.”

Mrs. Meals brought suit on said paper in Cobb superior court on the twenty-third day of February, 1876, to which the said Faw filed his plea of the general issue, and that he received the money not in his individual capacity, but as the agent of the Marietta Paper Mill Company; that the money received was expended for the sole benefit of said company, and not a dollar of it was used for his own purposes; that he continued as such agent until some time in the year 1873, when he was discontinued the agency, and one Edmonson was appointed his successor; that during the whole time he was agent there were assets of the company sufficient to pay Mrs. Meals; that during his agency he made various payments on said obligation out of the funds of said company, and after Edmonson's appointment he made payments thereof at the solicitation of Mrs. Meals.

In support of the plea, it was proven that the company was much embarrassed and needed money, when General Phillips, who owned and controlled a majority of the stock of the company, and with whom Mrs. Meals was boarding, advised Faw, the agent of the company, that he could get

nine hundred dollars from Mrs. Meals by signing the contract sued on. Faw obtained the money, on signing the paper, by the hands of Mrs. Phillips, the wife of General Phillips.

It also appeared in evidence that Mrs. Meals stated to Edmonson, after his appointment, that if she could get \$400.00, she would let the balance go over and reduce the rate of interest to ten per cent.

1. The court was called on by counsel on both sides to construe the instrument sued on, and in the presence and hearing of the jury, decided that the said Faw was individually liable on the contract, and that is the first assignment of error. The paper being free from ambiguity, we are of opinion that the construction thereof was solely for the court, and his so deciding in the presence of the jury was legal and proper. It was the duty of the court to construe the paper, and the legitimate result of construction was that it was an individual undertaking of the plaintiff in error.

2. The well settled rule of law seems to be, that whatever form or words may be employed, the intention of the parties must be the key to its determination. Whether he signed the company name *by himself*, or signed *as agent* of the company, or signed Faw, agent of the company; whether he employed the means received to his own or the use of the company, are illustrative, but not material to solve the issue. If he intended and did make a contract to personally bind himself—then the individual liability was complete, whether he or the company received the benefit of the loan.

The contract was that he received the money, to-wit the sum of nine hundred dollars, which said sum of nine hundred dollars he obligated himself to use in running capital of the company, and to keep the same in money, stock material, etc., not subject to the debts of the company. He further obligated himself to pay Mrs. Meals twelve per cent. interest per annum on the same, payable *monthly*.



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The Georgia Railroad *vs.* Fisk.

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He further obligated himself and promised to pay her as much as five hundred dollars of the principal on or before the first day of May next, if called upon; the remainder due and payable twelve months after date, at which time and date he promised to pay Mrs. Meals or bearer the balance.

The company being then involved, it is very apparent that Mrs. Meals put her money in the hands of the defendant, Faw, as her debtor and trustee. His obligation was personal, and whether the company would be liable to her in equity, or liable even to Faw, he, by the unambiguous terms of the contract, is liable to pay Mrs. Meals the money sued for.

Let the judgment of the court below be affirmed.

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THE GEORGIA RAILROAD *vs.* FISK.

1. Where the error assigned is that the court below should have granted a *certiorari* to the judgment of a justice against a railroad for the killing of a cow, on the ground that the presumption against the railroad had been rebutted, the answer of the justice is necessary to make such error appear to this court.
2. Even if the evidence stated in the petition for *certiorari* be correct, it does not appear that the presumption against the defendant was rebutted.

*Certiorari.* Railroads. Damages. Negligence. Practice in the Supreme Court. Before Judge SNEAD. Columbia Superior Court. March Term, 1880.

Reported in the decision.

W. M. & M. P. REESE, for plaintiff in error.

DAVENPORT JACKSON, for defendant.

JACKSON, Chief Justice.

The Georgia railroad train killed a cow on the track,

and a justice court gave judgment against the company for \$20.00. The case was carried by *certiorari* to the superior court, and the judgment was affirmed. It is now brought here by writ of error, and the sole question is, did the superior court err?

There is no return or answer made by the justice of the peace to the writ of *certiorari*, so far as this record shows, and therefore no evidence before this court whereby it is made to appear that the judgment of the superior court is wrong; and it is for the plaintiff in error to show to this court the error which he assigns, which is that the facts show that the presumption against the company was successfully rebutted. But conceding that the petition correctly sets out the facts, we cannot see that, under the ruling in 61 *Ga.*, 11, the presumption was rebutted. The cow was killed at a spring of water near an abrupt curve in the railroad track, where cattle were frequently killed before, and neither the fireman nor the engineer swear that either of them was on the look-out for cattle there. The consequence was that the engine was too near the cow to be checked when killed—so the justice court and the superior court must have reasoned—and we cannot say that error was committed in so reasoning from the facts set out in the petition.

It is true that the cow was hobbled, and another cow did escape unhurt, as testified by the engineer or fireman; but other witnesses swore that the speed of this cow and its free locomotion were not impeded by the condition it was in, and it might have got off the track had a watch been kept on the road-bed at this dangerous curve, and the whistle been blown and thus the animal alarmed, as it was in evidence that she had been seen to outrun man and dogs, and to jump fences with this chain on her.

The law is that the company must "make it appear that their agents have exercised *all* ordinary and reasonable care and *diligence*" in order to rebut this presumption, Code, section 3033; and section 3042 would seem to be

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Johnston, county solicitor, vs. Lovett, county judge.

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broader still. But we rest this case on section 3033 as the law applicable here, and cannot say that the court below committed error in ruling that *all* such diligence as the statute requires was not made to appear sufficiently to rebut this presumption against the company in all cases.

Judgment affirmed.

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JOHNSTON, county solicitor, vs. LOVETT, county judge.

When the act of 1876 provided that the fees of the county solicitor of Burke county should be the same as those allowed the solicitor-general in the superior court for like services, such fees became fixed, and a subsequent increase of the fees allowed solicitors-general did not also increase the fees of the county solicitor.

Officers. Laws. Costs. County matters. Before Judge Snead. Burke Superior Court. November Adjourned Term, 1879.

Reported in the decision.

A. W. RODGERS, by brief, for plaintiff in error.

No appearance for defendant.

CRAWFORD, Justice.

The legislature, in 1876, authorized the establishment of a court for the county of Burke, with a solicitor whose fees were to be the same as those allowed the solicitor-general in the superior court for like services.

In 1879, an act was passed increasing the fees of the solicitors-general of the state, allowing them the additional sum of five dollars for each trial, or plea of guilty filed in a criminal case.

The county solicitor therefore claimed that, as by the act of 1876 it was provided that he should have the same

fees as the solicitor-general, that when the legislature increased the fees of that officer, his own were *ex vi termini* increased.

The judge of the county court refused to pay more than was provided for by the act of 1876, whereupon he was ruled before the superior court for these additional fees, and upon the hearing of the rule the court dismissed the same, and the movant excepted.

All officers of the law are entitled to just such fees as the general assembly may provide, and no more.

In this case they were fixed by the act establishing the court quite as distinctly as if they had been repeated in the act itself, instead of referring to another by which they were to be defined. If, therefore, they had been inserted, it would hardly have been claimed that a subsequent act increasing the compensation of the solicitor-general embraced the county solicitor, without his being mentioned.

We think the ruling was right, and the judgment is affirmed.

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CROSS *vs*. JOHNSON, for use.

1. If suit be brought on an account which is not transferable by parol, in the name of the original owner for the use of the equitable owners, it is no ground for a non-suit that the latter could not sue in their own names. It is a matter of no consequence to the defendant, who cannot be hurt by the addition of the use clause to the name of the original owner.
2. Where a letter of credit, under which goods were delivered to the bearer and charged to the writer, was lost, it was not necessary to establish a copy in a separate proceeding. The contents could be proved by parol in a suit for the price of the goods.

Non-suit. Parties. Pleading. Evidence. Contracts.  
Before Judge JOHNSON. Emanuel Superior Court. April  
Term, 1880.

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Cross vs. Johnson, for use.

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Johnson, for the use of Davis & Marks, brought suit on an account against Cross. The evidence for the plaintiff was to the effect that Cross had written a letter of credit under which Johnson let one Felder have the goods for the price of which suit is now brought, charging them to Cross; that the account had been transferred by parol to Davis & Marks.

Defendant moved for a non-suit, which was refused. The jury found for the plaintiff. Defendant excepted, and assigned as error the refusal to grant the non-suit on the following grounds:

(1.) Because the assignment of the account and letter of credit should have been in writing.

(2.) Because the letter being lost, a copy should have been established before instituting this suit.

(3.) Because the letter was the real foundation of the suit, and should have been incorporated in the declaration.

Error was also assigned on the admission of proof of a parol assignment of the account, and on the admission of parol proof of the contents of the lost letter.

For the other facts, see the decision.

H. D. D. TWIGGS, for plaintiff in error.

CAMP & LIVINGSTON, for defendant.

JACKSON, Chief Justice.

This suit was brought on an open account by J. C. Johnson, for the use of Davis & Marks, against A. S. Cross. Johnson sold the goods to one Felder, and on written authority or letter of credit from Cross, the defendant, charged the account to him. Afterwards he transferred it to Davis & Marks, and the suit is brought in his name for their use. The jury found for the plaintiff, the court having refused to grant a non-suit on motion of defendant, and error is assigned on the admission of certain testimony to the jury and on the refusal to award the non-suit.

1. One ground for the motion to non-suit the plaintiff is, that the account was not transferable, and suit could not be brought by the real owners thereof. The answer is, that the legal title remained in Johnson, who could sue and did sue. It made no difference that he sued for the use of Davis & Marks. Such has been the practice time out of mind, and it is well settled law. 1 Kelly, 236; 25 Ga., 400; 26 *Ib.*, 395.

The defendant had no right to inquire as to the title of plaintiff, not being hurt by the equitable transfer. If he had paid Johnson, or had any equity against him, it could have been set up. 21 Ga., 583. The words "for the use," etc., are merely surplusage or *descriptio personæ*. 40 Ga., 217.

2. The letter of credit was introduced to show that Johnson had the right to charge the account to Cross, which he did do, and gave him credit, and not Felder. It said, substantially, in writing: Let this man have these goods and charge to me, and was an original promise to pay, and not within the statute of frauds. The original letter being lost, it was competent to introduce copy, or go into parol to show this authority; and there was no necessity of establishing a copy by separate proceeding. The copy, or contents, was proven by abundant evidence, including that of a subscribing witness.

Judgment affirmed.

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SIMMS, executor, vs. FLOYD.

1. It was error for the court to refuse a request to charge, and to state in the hearing of the jury that there was no evidence to authorize such a charge, when, in fact, there was such evidence.
2. When an attorney represented a party in court with his knowledge, and he did not object thereto, the presumption is that such services were rendered with his consent. and under an implied contract to pay what those services were reasonably worth. But it does not

(3.) Because the court again and again repeated the charge favorable to the plaintiff, and did not do so with that portion favorable to the defendant.

1. Upon the first ground of complaint herein set out, we think that it was error to have refused to charge as requested, because there was some testimony going to show that the plaintiff had been at first employed by I. P. Harris, and afterwards that he had been employed by John Harris. It is wholly immaterial whether the same might or might not have been believed by the jury, the defendant had the right to have that theory submitted to them for their consideration and finding. If they should have believed that the defendant did not represent the defendant from the beginning, then they would have found him liable only from the time of his employment.

Besides, we think that the remark of the judge in the hearing of the jury, that there was no evidence to warrant the charge requested was error if, indeed, there was evidence authorizing it.

An examination of the record discloses the fact that John P. Harris, in his testimony says, that in the beginning of the case he carried a message from I. P. Harris to the plaintiff that he wanted to employ him, and that afterwards the plaintiff told him that I. P. Harris had employed him. And again, that after the *fi. fa.* had been sent down to Newton county, that there was an interview between the plaintiff and John Harris, in which the latter said to the former, that the storm had come at last, and that he, the said John Harris, wanted the plaintiff to take charge of the case, go to Atlanta and attend to it. The witness himself was sent after the plaintiff by the said John Harris. All of which happened long after the first services were rendered by the plaintiff in the case. This witness further testified that after this interview he carried a proposal to the plaintiff from the said John Harris to pay him \$1,500.00 if he would take hold and go on with the

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Simms, executor, *vs.* Floyd.

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case. This occurred about the 20th of November, 1877. I. P. Harris also testifies distinctly that Judge Floyd was employed by him.

2. The error in the second ground of complaint we think is well taken, because, although it may be true that where an attorney represents a party in court with his knowledge, and he makes no objection thereto, the presumption of law is that the services are rendered with his consent, and under an implied contract to pay what those services are reasonably worth, but when the judge added, that if there were more than one party, and the attorney was employed by only one, and the others had knowledge that he was representing the whole case, and the services were for their benefit, and accepted by them, then to avoid liability it was their duty to have notified the attorney that they would not be liable, or otherwise they would be—was carrying the doctrine of an implied contract further than is authorized by law.

It is a matter of every day occurrence in our courts where two or more parties are sued, or indicted, that one party employs one attorney and another some other, and yet it is not expected, or indeed is it true, that each of the parties renders himself liable for the fees of the others because notice is not given that he is not to be held liable.

3. In this, the third ground of error, it is complained that the judge again and again *repeated* that portion of his charge which was favorable to the plaintiff, and did not do so with that part which was favorable to the defendant.

The judge having approved the grounds set out in the motion for a new trial as true, and this being one of them, we are bound to accept and consider the same as containing a correct statement of the facts as they transpired. 59 *Ga.*, 436. It may have been that the judge intended and expected that a copy in substance of the charge which accompanies the record, was to have been considered by this court in connection with the above ground in the mo-



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Iverson, trustee, *et al.* vs. Saulsbury, trustee, *et al.*

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tion for a new trial. This we cannot do, for a charge *in substance* written out some twenty days after the real charge was delivered to the jury, can, in no legal sense, be a part of the record of the case, although it may be ordered sent up therewith. If, however, in connection with his approval of the grounds of the motion for a new trial he had said, "as shown in my charge hereto annexed," or any qualifying words by which we could have taken this ground, and considered it in the light of the charge, even though it were for the first time then written out, they would have been adjudged together. But the ground, as approved, disconnected as it is from any qualification, we hold it error, and for this, as well as other reasons hereinbefore set forth, the judgment must be reversed.

Judgment reversed.

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IVERSON, trustee, *et al.* vs. SAULSBURY, trustee, *et al.*

1. It is too late, at the trial term of an equity cause, to move to dismiss the bill because there is a complete common law remedy.
- (a) Where the beneficiary of trust property illegally sold, was a minor, and after attaining majority he repudiated the sale and brought ejectment for the lot, a bill to enjoin the same, claiming compensation for valuable improvements innocently placed thereon by the purchasers, would not be without equity.
2. Where a bill was brought to enjoin an action of ejectment, it was too late to move to try both cases together after the testimony in the equity cause had closed and the argument was about to begin.
3. Where in an equity cause, questions were drawn up by counsel for complainants, and read in the hearing of opposing counsel, it was not sufficient for the latter to state generally that he objected to the questions; he should have specified the grounds of objection, and where he agreed to state them in argument, but failed to do so, the objection will not be considered here.
4. The verdict is not contrary to the evidence.
5. A chancellor at chambers has jurisdiction, under section 4221 of Code *et seq.*, to order a part of a trust estate to be sold to pay a

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Iverson, trustee, *et al.* vs. Saulsbury, trustee, *et al.*

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debt which was an incumbrance on the whole estate, the *cestui que trusts* assenting thereto, and all parties in interest having notice and being properly represented.

6. Although a purchaser from a trustee may have had notice of the trust, yet if he also had notice that his grantor held the claim which bound the trust estate, and received a deed from the trustee, under authority of the chancellor, conveying a portion of the trust estate, he would stand, in equity, upon the same footing as a purchaser without notice.
  7. Beneficiaries of trust property sold under an invalid order of the chancellor, who for years have seen the purchasers erecting valuable improvements thereon without objection, are estopped from setting up title thereto.
- (a.) Would a minor old enough to understand his rights be estopped by similar conduct?

Trustees. Equity. Jurisdiction. Practice in the Superior Court. Before Judge SIMMONS. Bibb Superior Court. April Term, 1880.

Reported in the decision.

R. F. LYON, for plaintiffs in error.

HALL & SON, for defendants.

JACKSON, Chief Justice.

B. V. Iverson, as trustee for wife and son, being in possession of two adjoining lots—five and six—in square seventy, in the city of Macon—under an order or decree in chancery rendered by judge Cole at chambers—sold lot number five at the price of \$2,500.00 to Collins & Son. James Iverson, his son, and *cestui que trust*, having attained his majority some time before, brought an action of ejectment for the said lot, in the year 1878, on the several demises of Iverson, trustee, and Mrs. Iverson, his mother, and himself. To enjoin this suit, Saulsbury, as trustee for his mother and her children, brought a bill on the ground that they had paid for the lot as purchasers

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Iverson, trustee, *et al.* vs. Saulsbury, trustee, *et al.*

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without notice, holding it from Collins & Son; that they had put on it improvements to the value of seven or eight thousand dollars, and had paid taxes on it to the amount of eight or nine hundred dollars—that James Iverson, and his father, the trustee, and his mother, the other *cestui que trust*—lived all the while on the adjoining lot number six, and knew all about these improvements. James being either of age, or old enough to know all his rights in the premises, and yet none of them uttered any word of warning or objection, and are therefore estopped—that the consideration of the sale to Collins & Son supported these *cestui que trusts*—and that equity and good conscience will not allow them to recover the lot with the improvements thereon.

On the trial of this equity cause, the jury found a special verdict on the questions propounded by the court, and on that verdict a decree was rendered, vesting the title to the lot in the Saulburys, and perpetually enjoining the Iversons from pressing the action at law, or otherwise interfering with the title so vested in the complainants. Thereupon the defendants made a motion for a new trial on many grounds therein stated, which motion was not granted by the court, and defendants bring their writ of error to this court for the refusal to grant the motion.

1. The first ground is that the court erred in not dismissing the bill for want of equity, and because the remedy at law was complete.

The latter reason cannot be considered, because the motion to dismiss the bill was made on the hearing at the trial term—too late to dismiss the bill on account of an adequate remedy at law.

But there is equity in the bill. If the defendants could recover at all, it is quite clear that they must pay for the improvements. If James Iverson had been an infant when the lot was sold and the improvements were made, and when he attained his majority repudiated the sale of

the naked lot, it would be inequitable to permit him to recover it with such valuable improvements made by the purchasers, without compensating them in some sort at least for their improvements, and to mould a proper judgment in such a case, demanded either an equitable plea, or a regular bill in defense of the ejectment suit. And the complainants could use either remedy at their option.

2. The second ground is not more solid than the first. It is because the court refused to try the ejectment suit and the equity-cause together. Without considering other reasons for declining to try two cases at once, it is enough to say that the motion was not made until the testimony was concluded and the argument was about to begin. It came too late.

For the same reason there is nothing in the motion of defendants to open and conclude the argument.

3. The complaint that some of the questions propounded were not fairly put, and that others were irrelevant to the issue, is not well grounded under the explanatory note of the presiding judge. The judge says that the questions were drawn up by counsel, and read in their hearing, and while defendants' counsel did make general objection to the questions prepared by complainants' counsel, yet he did not specify what they were, though requested to do so, and promising to specify them in the course of his argument to the jury.

It is obvious that if anything irregular was done under such circumstances, the laches of defendants prevented the correction which might have been made, and no new trial should be granted for such objection, not specified when counsel was required to specify the ground of his complaint. But we cannot see that anything was done so irregular or improper in the questions propounded as to hurt the defendants.

4. Again, it is alleged that the verdict of the jury is contrary to the weight of the testimony on several issues presented to them.

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Iverson, trustee, *et al.* vs. Saulsbury, trustee, *et al.*

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We think that there is evidence enough to sustain the answers which are material to a proper adjudication of the cause, and a legal decree thereon; and such being the case, it becomes unnecessary to inspect closely each question and the answer thereto, and testimony thereon not affecting the real merits of the case.

The testimony, though conflicting it may be, is sufficient to authorize the finding that Saulsbury is an innocent purchaser without notice of the usury in the Collins & Son's transactions with Iverson, if there was usury, or that their advances were not made for the benefit of the trust estate and of the *cestui que trusts*; though these questions themselves are hardly essential in the view we take of the case.

5. The great question in the case is whether the chancellor at chambers had jurisdiction to order the sale of this lot by this trustee with the assent of the *cestui que trusts*, and to direct the deed to be made by the trustee to Collins & Son in settlement of their debt of twenty-five hundred dollars, and thus to lift this amount of indebtedness from No. 6, on which the dwelling of the Iversons stood. If the chancellor had jurisdiction to make that decree, inasmuch as Mrs. Iverson assented to it in person, and James Iverson by guardian *ad litem*, appointed by the chancellor, all other objections on pre-existing facts are concluded by that decree at chambers, just as completely as they would have been concluded by bill tried and decreed upon in open court.

The power, if it exists, must be derived from our statutes, and is to be found in the Code.

Section 4221 declares that, "all proceedings *ex parte* or in the execution of the protective powers of chancery over trust estates, or the estates of the wards of chancery, may be presented to the court by petition alone, and such other proceedings be had therein as the necessity of each case may demand."

The next section—4222—enacts that such courts are

always open, and that the judge may receive and act upon all such petitions at chambers, transmitting the proceedings to the clerk, to be entered on the minutes or of record.

The next section, 4223, declares that in applications *for the sale of trust property*, the removal of trustees or the investment of trust funds, or similar cases, where persons other than the applicant are interested, notice to such persons is necessary, and the next, 4224, declares that, "if minors are interested and they have no guardians, guardians *ad litem* must be appointed and notified before the cause proceeds."

These four sections are embodied in chapter sixth, title twenty-fifth, and part third of the Code, and stand together. They appear to vest in the chancellor at chambers full power over trust estates in respect to the removal of trustees, the sale of trust property and the investment of trust money. In the exercise of these great powers chancellors should be cautious and see that the case is clearly made out, and that their wards are protected and their estates are preserved and their rights protected, just as in open court and before a jury it would be their duty to see that the same rights are protected. But if they have the jurisdiction at chambers, the presumption is that all these rights are as well guarded as before the juries in open court. The security of the trusts and the interests of beneficiaries rest in the one case as in the other, mainly in the heart of the intelligent and upright judge.

It was the duty of the chancellor in this case to investigate the facts, to see that there was no collusion, to guard the interests of all parties, and to make such a decree as would be best for the trust estate, to relieve it from its indebtedness, and at the same time to do justice to one who had given legitimate credit for the benefit of that estate and of its beneficiaries. The presumption is that judge Cole did all this, and by this decree, these par-

ties being all represented before him, it would seem are concluded as effectually as they would have been by a decree in term. Other sections of the Code corroborate the view we take in regard to the power given the chancellor at chambers by those we have cited. Section 2327 declares that the *corpus* of the trust estate may be sold by order of the court of chancery, that the application may be made to the judge in vacation, on full notice to all parties, and the order to sell may be granted by the judge at chambers, the proceedings to be recorded as in cases of appointment of trustees. And section 2328 declares that such sales, *unless otherwise provided in the order*, shall be made under the same rules and restrictions as administrators' sales. This sale was otherwise provided in the order. The terms were all settled and fixed by the order. It needed no confirmation as a public chancery sale would ordinarily require; because the price, the purchaser and the entire contract, were all fixed beforehand in the order of sale.

6. But suppose that we are in error in all this, still, if Saulsbury purchased innocently of Collins & Son, he would be protected in equity, though the original sale to Collins & Son was had only under color of judicial decree. Section 2329 of our Code provides, that without any such order or decree, if Saulsbury had bought *bona fide*, and without notice of the trust, he would be protected. Here he bought, it is true, with notice of the trust, but with notice, too, that his grantor had a debt which bound the trust estate, having benefited it and supported the beneficiaries, and held a deed, the consideration of which was that debt, and that deed, too, authorized by the order of the chancellor. Is not his case full of equity, and almost, if not altogether, as strong as that of the purchaser without notice of the trust?

7. Again, are not these beneficiaries estopped by their conduct from setting up their title against that of Saulsbury? James Iverson, if not of age from 1873 to 1875,

while this improvement was made on this naked lot, must have been very near it. It is a little remarkable that his age is not disclosed exactly, but he seems to have been near his majority in 1871, when the purchase was made, and, from the record, had reached it before the improvements were completed. Yet he interposed no objection. Mrs. Iverson was estopped, and he was clearly estopped, too, if of age, and upon analogy to that ruling in *Dotterer vs. Pike*, 60 Ga., 29, it would seem he was estopped if he knew his rights, and fraudulently saw this large expenditure of money on his property without making known his interest; certainly he would be as to the improvements put on the lot.

In any view of the case which we are able to take from the record before us, we are constrained to conclude that the decree is right, and should be enforced.

Judgment affirmed.

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WESLEY vs. THE STATE OF GEORGIA.

1. Where the record is so confused or imperfect that an alleged error cannot be passed upon, it will not be considered.
2. That an indictment states that the grand jurors were "sworn, chosen and selected," is no ground for quashing it.
3. Although a juror may appear to be competent when put upon his *voir dire*, and may have been sworn in chief, still he can be proved incompetent and rejected.
4. On a trial for rape it is essential to show, either by direct or indirect evidence, actual carnal knowledge. This not being shown in the present case, the verdict is contrary to law.

Criminal Law. Practice in the Supreme Court. Jurors. Verdict. Before Judge LESTER. Cobb Superior Court. November Adjourned Term, 1879.

Reported in the decision.

C. D. PHILLIPS; W. P. MCCLATCHY, for plaintiff in error.



R. N. ELY, attorney-general; THOS. F. GREER, solicitor-general, for the state.

CRAWFORD, Justice.

The plaintiff in error, who was convicted of rape at the November adjourned term, 1879, of Cobb superior court, and to whom a new trial was refused, comes before us and says that the judgment of the court below was illegal because—

1. The grand jury finding the bill of indictment was not drawn according to law.

2. The court should have quashed the indictment on the ground that it read, "the grand jurors sworn, chosen and selected," instead of "selected, chosen and sworn."

3. One of the jurors, after having qualified himself and been sworn in chief, was permitted, on motion of the solicitor-general, to show that he was disqualified, and therefore set aside for cause.

4. The verdict is contrary to the evidence and without evidence to support it, and so strongly against the weight of evidence as to shock the moral sense.

1. Upon the first ground taken, we have to say that an examination of the record does not show satisfactorily to this court, from the minutes of the superior court of Cobb county, exactly what the judge did touching the adjournment from the regular to the adjourned term, although the minutes of the adjourned term show that its opening was legal and regular. We will not rule upon this point, from what appears to be an incomplete record, as well as because we are of opinion that a new trial should be granted upon another point in the case.

2. Should the court have quashed the indictment because the solicitor-general reversed the order of the words from "selected, chosen and sworn" to "sworn, chosen and selected"? We do not think that such transposition would render the indictment so defective as to justify its being quashed.

3. The third ground makes the question as to whether a juror who upon his *voir dire* has shown himself competent, been accepted and sworn in chief, can afterwards be set aside for cause.

The importance of having a juror who is competent under the law, in all respects, to try a party charged with crime, is universally recognized; whenever, therefore, it is discovered that there is one on the panel who is incompetent, and the same was unknown to the parties or the counsel whilst his qualification was being ascertained, and no testimony has been submitted to the jury, it is right and proper that he should be set aside and another chosen. This principle has been ruled by this court in *Jackson vs. The State*, 51 Ga., 408; 45 Ib., 11.

4. The last ground relied upon is that the verdict is contrary to evidence and without evidence to support it.

The charge against the accused was rape, that is, the carnal knowledge of a female (Mrs. Fox) forcibly and against her will. A thorough examination of the testimony fails to show the fact that he did have any *actual* carnal knowledge of this woman. Circumstances are quite sufficient in law to authorize a verdict of guilty against one charged with crime, but in all cases the *corpus delicti* must be established, either by positive or by indirect testimony. In most cases tried by the courts, to show the commission of the crime itself is the first step, and no conviction can occur until this is done; as in murder, a homicide is shown, in burglary, the breaking and entering with felonious intent, in robbery or larceny, that something has been stolen, and in rape, that carnal knowledge of a female forcibly and against her will has taken place. In this case, as in all others, the verdict may go to the utmost limit of the proof, but that which the main and only witness did not know, the jury cannot know. A witness may testify to the criminal conduct of a party, and if believed it warrants a conviction for *the crime* which was shown to have been committed, but for none other,

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The City Bank of Macon vs. Crossland *et al.*

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and especially for none other of a higher grade in turpitude or punishment. Mrs. Fox testifies to much criminal conduct, and earnest effort on the part of the accused, and a stout resistance on her own, but she adds that she became unconscious, and "I do not know what was done to my person no more than if I had been buried ten feet under the ground."

This being the only testimony as to any actual rape having been committed, we do not think there is sufficient proof to justify the verdict. Had Mrs. Fox testified to any condition of her person indicating cohabitation, or such carnal connection even by the accused with her person as the law defines to be rape, then the case would be different, but the distinction between rape and the attempt to commit it, or between either and innocence, is great and vital both in fact and in law. The want of testimony constrains us to award a new trial.

Judgment reversed.

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THE CITY BANK OF MACON vs. CROSSLAND *et al.*

1. Depositors in a bank that has failed may proceed at law for the recovery of their debts under §3367 *et seq.* of Code, and thus enforce the ultimate liability clause of the charter as against the stockholders; or they may seek in an equitable proceeding satisfaction out of the assets legal or equitable, and also a decree against the bank for the full amount of their debts, as a basis for proceeding against the stockholders.
2. The failure of the bill to accomplish all of its purposes on account of the insufficiency of evidence to sustain the allegations, as for instance to secure the appointment of a receiver, or to annul the assignment, would not deprive a court of equity of jurisdiction to decree what was proper in the case, as the amount of complainants' debts against the bank.
3. It is not apparent but that complainants, under the provisions of the Code, could have proceeded by petition or bill in equity to obtain these judgments, and as all the property of the bank has been transferred to an assignee, and could not be the subject of levy and sale,

being equitable in its nature, the creditors had clearly the right to obtain the decree in this case, and when they seek to enforce the same against the property of the stockholders, their defenses are preserved as in cases of illegality; and should they pay the amount claimed of them, they would be subrogated to all the rights of complainants to administer the assets in the hands of the assignee.

4. The refusal to decree in favor of creditors of the bank not before the court was proper. It would be in the power of the assignee to appropriate the assets to their debts under the provisions of the deed of assignment, without decree.
5. The receiving payment of sixty per cent. of complainants' debts, and the ratification thereby of the deed of assignment, did not impair their right to seek satisfaction of their claims thus reduced, by a legal or equitable proceeding against the assets of the bank, or the stockholders.

Equity. Banks. Corporations. Stockholders. Before Judge SIMMONS. Bibb Superior Court. October Adjourned Term, 1879.

Reported in the opinion.

R. F. LYON; WHITTLE & WHITTLE, for plaintiff in error.

HILL & HARRIS; LANIER & ANDERSON; BACON & RUTHERFORD, for defendants.

HAWKINS, Justice.

In June, 1869, Crossland and other depositors and creditors of the City Bank of Macon, filed their bill on the equity side of the court, in Bibb county, against said corporation and Thomas B. Gresham, its assignee, asking an injunction—that the assets of the bank (which had by the deed of assignment of the bank been conveyed to said assignee) should be taken out of the hands of said Gresham and put in the hands of a receiver of the court, to be collected, and the proceeds preserved and applied to the payment of the just debts due by said bank, and

praying among other things, a judgment or decree against said bank for the respective amounts due said complainants, so as to proceed against the stockholders of said bank, as the law provided. The object of the bill was two-fold, to subject the assets and property of the corporation to the payment of the just debts, and to obtain decrees for the debts of complainants preparatory to enforcing the same against the stockholders under the personal liability clause in the charter of said bank, and according to the provisions of the Code to enforce the same.

On the application for the appointment of a receiver, and a writ of error, this court held that there was no necessity for a receiver in the case at that time, but that the bill was or could be made to accomplish all that the complainants were entitled to, and if, in the pendency of the cause, the appointment of a receiver should be deemed necessary, the superior court could then act upon the matter.

The defendant and assignee answered this bill, and in the answer of the assignee exhibited a full statement of the debts and assets of said corporation.

Neither the stockholders, or other of the creditors, except the complainants, were or ever did become parties to said bill, either as complainants or defendants, by appearance and pleading.

The cause was, by order of the presiding judge, referred to a master to take the account between the parties, to report to the court the amount due complainants, the amount of assets and available property in the hands of Gresham, the assignee, the stockholders of the bank, and the amount owned by each.

On the hearing, the amounts due by the bank to complainants respectively were ascertained and so found; also the names of the stockholders and amount owned by each, and the amount of assets in the hands of the assignee.

The report was made to the superior court, and the defendant, the City Bank, filed exceptions thereto, which were overruled and disallowed by the court, when, on motion of the complainants, the court, upon the report of the master, allowed and decreed to each of the complainants a judgment against the City Bank for the amount of the balance respectively due to each of them, and interest thereon, with costs of the proceeding.

To which the defendant objected, and excepts upon the grounds:

1, 2. That such a decree would not cover the issues made by the bill.

3. This was the province of a court of law, and for that alone a court of equity had not jurisdiction.

4. If this was a creditors' bill against the bank and its assignee to marshal and condemn its assets to the payment of its debts, such a decree would fall short of the intended scope and object of said bill.

5. As the complainants had, as creditors, ratified and accepted this assignment by the receipt of dividends, they were bound thereby, and any decree that did not dispose of the assets for the benefit of creditors was inequitable to the stockholders.

5. Said decree would settle nothing and leave the parties where it found them. The court should dispose of all the assets in the hands of the assignee for the benefit of creditors.

The corporation is the only defendant that complains here by writ of error. Neither Gresham, the assignee, any stockholder, or any creditor save the complainants, are before this court, and therefore we will consider and decide this case between the parties to the record.

1. Whether the complainants were properly in a court of equity under the allegations in the bill, and the prayer for relief, is therefore the main question here. It will be conceded, we apprehend, that the depositors who had placed their money in the bank of the defendant for safe

keeping, and who failed to get the same on demand, had some cause of action either at law or in equity, or both, and it was conceded that these debts, except the interest claimed, were just debts against the said defendant. They might have brought their several suits at law for the recovery of their judgments, and then proceeded to enforce the same either out of the property of the bank that was subject to seizure and sale, or in default of property as evidenced by a return of *nulla bona*, proceeded to levy and sell the property of the stockholders, as is provided in the Code of Georgia, §3367 *et seq.*, to respond to plaintiffs, as the ultimate liability clause in the charter of the bank provides; or they might have sought in an equitable proceeding, satisfaction of their claims out of the assets, legal or equitable, and also the obtainment of a decree against the bank for the full amount of their debts, principal and interest. And if the bill failed in the accomplishment of all its purposes, by reason of the insufficiency of evidence to sustain the allegations, still it would be a good bill for the obtainment of some of its objects. For instance, the failure to have a receiver appointed, or to annul the assignment, could only be finally determined on the trial, and the failure of these could not be said to deny to a court of equity the jurisdiction and right to decree what was proper in the case, as to decree the amount of complainants' debts, with interest thereon, so as to enforce payment from the stockholders.

3. It is not apparent to us but that complainants, under the provisions of the Code, could have proceeded by a petition or bill in equity to obtain these judgments, and as it appears from the facts in this case that all the property of the bank had been transferred to an assignee, and could not be the subject of levy and sale, being equitable in its nature, the creditors of the bank had clearly the right to obtain the decree in this case, and when they seek to enforce the same against the property of the stockholders, then their defenses are preserved as in cases of illegality,

and should they pay these respective amounts, we apprehend they will be subrogated to all the rights of complainants to administer the assets in the hands of the assignee.

4. It would have been a strange proceeding to have decreed, as complainants desired, in favor of the other creditors against the bank, who by the pleadings were not so asking, or to give judgment or decree against the assets in the hands of the assignee, when said assignee did not so consent to pay; besides, it is in his power without decree to appropriate the assets to the payment of the debts, according to the provisions of the deed of assignment, without a decree. Much less can this court require and adjudge the same or either in this case, wherein the bank and the complainants are the only parties to this writ of error.

5. If the assignee, the stockholders, or the other creditors were dissatisfied with the decree rendered in the court below, they have not complained here. The receiving payment of sixty per cent. of complainants' debts, and the ratification thereby of the deed of assignment, did not impair their right to seek satisfaction of their claims, thus reduced, by a legal or equitable proceeding against the assets of the bank, or the stockholders.

Judgment affirmed.

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McCRA Y vs. SAMUEL.

1. Demand for payment is necessary as a condition precedent to the enforcement of a landlord's special lien on crops, but not to the enforcement by distress warrant of his general lien on the property of his tenant.
2. By the constitution of 1877, justice courts are required to be held at fixed times and places. A distress warrant which is made returnable to the next term of the justice court for the district is sufficient, without specifying the day on which it would be held.



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McCray vs. Samuel.

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3. Where a landlord has two demands for rent, due for consecutive years, the amounts being liquidated, he is not compelled to unite the demands in one distress warrant, although he has the option to do so.

Lien. Distress warrant. Justice Courts. Actions. Before Judge WRIGHT. Decatur Superior Court. May Term, 1880.

Reported in the decision.

J. E. DONALDSON ; R. R. TERRELL, by brief, for plaintiff in error.

No appearance for defendant.

JACKSON, Chief Justice.

Two distress warrants were issued for rent, each for seventy dollars, one for 1875 and the other for 1876, and both were levied on the crop of 1879. On motion of defendant they were dismissed, illegality thereto being interposed, and the judgment of dismissal is the error assigned. There are three grounds of illegality taken:

1. The first is because no demand was made for payment before the warrants were sued out. None was necessary. This is not a proceeding to enforce the landlord's special lien on the crops of the year for which the rent was due, when a demand for payment would have been necessary, but it is a proceeding to enforce a general lien, under the general distress law, for rent. Code, sections 4082-3-4: 55 *Ga.*, 655; 57 *Ga.*, 31.

2. The next ground is that the warrants were made returnable to the next justice court of the district, without naming the day when that court would be held. The constitution of 1877 requires them to be held on fixed days every month. Supplement to Code, §632. Before that

constitution the time when the court was held should have been named, but now the old law is revived, the law names it, and everybody should know the day. Code, sections 4083, 3635.

3. The third ground of illegality is, that the two demands for rent were not consolidated and included in one warrant and returned to the superior court. The plaintiff might have done so if he wished, but it was optional with him. The rents were for separate years, and the amounts liquidated and fixed by contract. Code, §4133.

So the judgment dismissing these warrants is erroneous, and must be reversed.

Judgment reversed.

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COX vs THE BOARD OF COMMISSIONERS OF WHITFIELD  
COUNTY.

(JACKSON, Chief Justice, was providentially prevented from presiding in this case.)

1. The act of 1872 did not confer on the commissioners of Whitfield county judicial powers except as to roads.
- (a). If they had any judicial powers as to claims against the county, a refusal to pay unaccompanied by any judgment as to correctness or incorrectness, would not be conclusive.
2. *Mandamus* may be a proper remedy to compel a board of commissioners to pay a fixed and established debt, but suit is the proper mode of determining a liability which is unliquidated and denied.

County matters. Actions. Courts. Judgments. *Mandamus*. Before Judge McCUTCHEN. Whitfield Superior Court. April Term, 1880.

Reported in the decision.

W. C. GLENN, for plaintiff in error.

JOHNSON & MCAMY, for defendants.

CRAWFORD, Justice.

The assignment of error in this case consists in sustaining a demurrer to a suit against the county of Whitfield, upon a demand due the sheriff for medicines and attention to prisoners during their confinement in the common jail.

The allegations were that the account was due, had been presented to the board of commissioners, payment demanded and refused.

The demurrer was based upon three grounds :

1. That the board of commissioners having passed upon the claim and refused to pay it, their decision was final, unless reviewed by *certiorari* or appeal.

2. Because a *mandamus* should have been brought to enforce payment.

3. Because neither the superior nor the justices courts have jurisdiction of this claim, the same having been conferred exclusively upon the board of commissioners.

1. By the act of 1872, a board of commissioners of roads and revenues was established for Whitfield county, with exclusive jurisdiction, among other things, to examine, settle and allow all claims against the county. The right, therefore, to do these specified things is undoubted. But suppose they refuse to do either, or do the first and then refuse to do the last, what remedy is provided by the act? None at all.

To give power not granted, by implication, is never to be done except where it is obviously intended, or clearly necessary to the exercise of such power. It is not to be presumed that the legislature intended to do more than it did, otherwise it would have so declared.

It is said, however, that the right of *certiorari* or appeal exists. A sufficient reply to this is, that the writ of *certiorari* lies to errors committed by justices of the peace, *ex-officio* justices, corporation courts or councils, inferior

judicatories, or persons exercising judicial powers. The act of 1872, creating this board, invests it with judicial powers only in its third section, wherein it is clothed with the authority to enforce the road laws as was originally done by the justices of the inferior court. Their powers are mainly ministerial, and doubtless were so intended, or else some general provision would have been inserted whereby the same could have been determined. Be that, however, as it may, in this case there was no judgment rendered; the allegation was that payment *was asked and refused*, when plaintiff resorted to his common law remedy, which we think he had the right to do upon their failure or refusal to hear and allow his claim.

The right of appeal lies from courts of ordinary, a county judge, a justice of the peace, and from such other *judgments* as may be provided for by law. This board being within none of the above judicatories, and there being no law authorizing any appeal from their action, none exists.

2. *Mandamus* would be a remedy to which the party might resort had his claim been recognized and allowed, and no action taken by this board to provide for its payment. But it is unliquidated, and its very existence denied. When the same is fixed by a judgment, which is the only mode left to the plaintiff after a refusal of the commissioners to allow it, then he may resort to this writ.

The judgment, therefore, must be reversed, the demurrer overruled, and the cause proceed.

Judgment reversed.

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WEILLER & ELLIS vs. JOHNSTON.

Where defendant in *fi. fa.* executed a mortgage on three billiard tables to secure a *bona fide* indebtedness to claimant, and prior to the rendition of the judgment in favor of the plaintiff, surrendered the property in satisfaction of the debt, the title passed, though the pos-

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Weiller & Ellis vs. Johnston.

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session of the property never changed, and though there was no written conveyance until after the judgment. The question of the good faith of the transaction was matter for the determination of the jury.

Claim. Sales. Before L. N. WHITTLE, Esq., Judge *pro hac vice*. Bibb Superior Court. April Term, 1880.

Reported in the decision.

BLOUNT & HARDEMAN ; HILL & HARRIS, for plaintiffs in error.

A. PROUDFIT, by brief, for defendant.

HAWKINS, Justice.

The plaintiffs in error, on the twenty-sixth day of October, 1875, obtained a judgment against one Patterson, for the sum of two hundred and ninety dollars. On the fifth day of June, 1876, the *fi. fa.* issued upon said judgment was levied upon three billiard tables, and other property in the possession of the defendant, Patterson.

Johnston interposed his claim thereto, and on the trial proved that prior to the date of said judgment, to-wit: in the year 1874, Patterson being indebted to him in the sum of twenty-five hundred dollars, executed and delivered to Johnston, as security for said debt, a mortgage upon the property.

Early in 1875, Patterson not being able to pay the debt, surrendered the property to Johnston in payment of the debt, and put the property in the possession of Johnston. The house in which the property was belonged to Johnston, and he rented it and the property to Patterson, for fifty dollars per month; at the time he turned the property over to Johnston, he was Johnston's tenant. The property was not *removed*, but remained as before, in the house, and was rented with the house to Patterson ; all this is in parol, and occurred before the judgment of the plain-

tiffs. After the date of the judgment a deed was made to the property in accordance with the parol agreement.

The mortgage was also before the court, and the plaintiffs showed that the property was not worth more than eight hundred dollars. Upon this state of facts the presiding *pro hac vice* judge found the property not subject.

The errors complained of are, that the court rendered the judgment contrary to evidence and without evidence, and that the parol sale, without a change of the possession, did not free the property from the lien of the judgment; that the retention of possession by Patterson was not sufficiently explained. There was no change of the status of the property in fact, but in law Patterson surrendered all dominion, and Johnston assumed ownership over the property.

Our law does not require absolute delivery to perfect a sale, but a constructive delivery will suffice. The intention of the parties may dispense with delivery according to such intention, or the character of the property and the uses to which it may be applied, as, for instance, in the sale of a stock of goods, the delivery of the key to the house, or three billiard tables situated in a saloon where such property is used, would answer in the place of an actual manual removal thereof.

If the surrender of the property to Johnston in payment of the mortgage was in good faith, and the intention of the parties was that it was to stand in lieu of actual delivery, then the requirements of the law were fulfilled as to delivery, and though in parol, would pass the title free from the lien of a judgment subsequently obtained. The execution of the parol agreement after the judgment, by making a written conveyance of the property, would not affect the legal status of the property arising from the sale before the judgment, though all evidence of the same rested in parol. These circumstances sufficiently explained the possession of Patterson at the date of the levy.

The court, acting as judge and jury, has found there

was no fraud, and adopted the theory of Johnston as testified to by him. We see no error in refusing the new trial.

Judgment affirmed.

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PARK vs. PARK.

A court of equity has jurisdiction to settle a trust estate at the time provided for the termination of the trust. That a court of law may have concurrent jurisdiction will not oust that of a court of equity.

Especially so where fraud in the management of the trust is charged. (a.) Where a will provided a legacy for a minor to be paid to her upon her arrival at majority, and that until then the executor should keep the property and money so bequeathed free from liability to account for hire or interest, a bill by the legatee, after she became of age, to compel an account and settlement of the legacy itself, and charging fraudulent use of the funds by the executor, was not demurrable for want of equity.

Equity. Fraud. Trusts. Before Judge LAWSON.  
Greene Superior Court. March Term, 1880.

Nancy E. Park filed her bill against James B. Park, alleging, in brief, as follows: In 1862 Betsy Ann Park died testate. By her will she left to complainant a legacy consisting of certain personalty and two thousand dollars out of the money then on hand; there was on hand four thousand dollars in specie. Very shortly after the testator's death, the executor sold this specie for Confederate money at a premium, and used the money so received to pay his own debts. He has frequently admitted the justice of the claim, and has declared his intention to pay it. He never made any returns except one, which, with the appraisement, was made in 1863. Both were illegal and fraudulent. In 1880, after complainant had demanded her legacy, he endeavored to make a return and to keep the same secret, thereby evidencing his intention to defraud her. She became of age in 1870, and has since

demanding payment of her legacy, which has been refused. The object of the bill was to have an account and settlement.

Defendant demurred to this bill on the following grounds:

- (1.) For want of equity.
- (2.) Because there was an ample common law remedy.
- (3.) Because the returns of the executor were not exhibited to the bill.

By amendment he demurred to all that part of the bill relating to such returns. The court sustained this ground of demurrer, and struck that part of the bill. The other grounds he overruled. Defendant excepted.

JAS. B. PARK; JNO. C. REED; F. C. FOSTER; M. W. LEWIS & SONS, for plaintiff in error.

COLUMBUS HEARD; WM. H. BRANCH; P. B. ROBINSON, for defendant.

JACKSON, Chief Justice.

This bill was brought by the complainant against the defendant as executor of the will of her aunt, for account touching certain chattels, and especially for two thousand dollars, all of which was bequeathed as a legacy to complainant in an item of decedent's will. The defendant demurred on the ground that there was no equity in the bill, and that the remedy at law was adequate and complete. The court overruled this demurrer and error is assigned here thereon.

The relation between the parties is that of trustee and *cestui que trust*, and in such cases equity has jurisdiction. Code, §§3130, 3193; 61 Ga., 125.

Besides, fraudulent conduct is charged in the bill. Even if a court of common law had concurrent jurisdiction, that would not oust equity on matters within its



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Couch, administrator, *vs.* Couch.

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peculiar province. Code, §3096. Our courts of equity have generally the same jurisdiction as English chancery courts. Code, §3100. And in England the jurisdiction is clear. Williams on Ex'rs, 1645; 5 Term., 690.

Judgment affirmed.

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COUCH, administrator, *vs.* COUCH.

1. Suit may be brought in this state on any written promise, by attaching a copy to the declaration, and it is not necessary in the body thereof to set out the stipulations of the contract in order to introduce it in evidence.
2. In a suit on a written promise no plea was filed; at the time of the trial the defendant was dead; his administrator proposed to show a conversation had by the deceased with a third party concerning a settlement of the liability:

*Held*, that the evidence was properly rejected.

3. A husband executed to his wife the following instrument:

"\$600.00—Twelve months after date I promise to pay Malvina Couch, six hundred dollars for cash money loaned to me, and if not paid punctually she is to have six shares paid-in stock in the Griffin and North Alabama railroad, with coupons and interest. This March 28th, 1874.

[Signed]

J. M. COUCH,  
Trustee for Malvina Couch."

*Held*, that under this contract, turning over the stock and receipt of dividends was not equivalent to payment.

Pleadings. Evidence. Contracts. Before Judge WRIGHT. Baker Superior Court. May Term, 1880.

To the report contained in the decision and head-notes it is only necessary to add that there was evidence tending to show that the railroad stock mentioned in the contract had been received by Mrs. Couch and some dividends collected; and also, that it was of small value at first, and depreciated to nothing.

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Couch, administrator, vs. Couch.

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A. L. HAWES; H. MORGAN, for plaintiff in error.

E. C. BOWER; BUSH & LYON, for defendant.

CRAWFORD, Justice.

This suit was brought in the superior court of Baker county upon the following paper:

"\$600.00.

"Twelve months after date I promise to pay Malvina Couch, six hundred dollars for cash money loaned to me, and if not paid punctually she is to have six shares paid-in stock in the Griffin and North Alabama railroad, with the coupons and interest. This March 28th, 1874.

[Signed]

J. M. COUCH,  
Trustee for Malvina Couch."

The declaration was in the statutory form with a copy attached. There was no plea filed, the verdict of the jury was for the full amount claimed, the defendant, upon being refused a new trial, excepted.

The assignments of error material to a judgment of this court are

1. That the court erred in admitting the contract sued on in evidence, over defendant's objection, when the declaration did not set out the stipulation therein contained. Under the law of pleading in this state, the plaintiff may set out his cause of action against the defendant on a "written promise of any description by adding a copy of which, with the indorsers, if any, and the credits thereon," and it is sufficient. This paper being a written promise, and having a copy thereof added to his declaration, clearly authorized the admission of the paper to the jury. Code, §3391.

2. That the court erred in rejecting the evidence of R. B. Odom, who was called to testify to a conversation had with J. M. Couch in reference to a settlement of the matter with the plaintiff.

J. M. Couch was the maker of this contract. He was dead. No evidence of any settlement of the matter had

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Hamilton *vs* The Grangers' Life and Health Insurance Co.

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been put in issue by any plea of the defendant, nor was there any testimony of any conversation put in by the plaintiff, and we are unable to see upon what legal ground the testimony of this witness was admissible.

3. The errors complained of in the judge's charge are, that if the husband borrowed the money from his wife and she agreed to receive, in full satisfaction, this railroad stock, she would have the right to repudiate it if she desired and recover the money; and that under the contract, as he construed it, the railroad stock was not payment of the liability; and further, that the delivery of the stock and the collecting of the dividends would not be a payment of the original note, and she would be entitled to recover the principal and interest found to be due.

Concurring with the judge in his construction of this contract, that the railroad stock was not to be in payment of the liability incurred thereon, and that the plaintiff was entitled to recover whatsoever was due, and there being no plea of payment or settlement of the obligation by the defendant, the error complained of as to the right of the wife to repudiate any agreement of that sort would not change the verdict, and therefore the judgment must stand affirmed.

Judgment affirmed.

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HAMILTON *vs*. THE GRANGERS' LIFE AND HEALTH  
INSURANCE COMPANY.

(JACKSON, Chief Justice, was providentially prevented from presiding in this case.)

1. Recoupment as a defense must spring out of the contract upon which the plaintiff sues, and is confined to that. A claim arising out of a distinct transaction cannot be recouped against a suit on a promissory note.
2. The plea of set-off extends to all mutual demands existing between the parties at the date of the commencement of the action. Therefore money procured by the plaintiff from the defendant by fraud may be set-off against a suit on a note for money loaned.

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Hamilton vs. The Grangers' Life and Health Insurance Co.

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(a.) Notes without words of negotiability, although held by a *bona fide* purchaser, are subject to the equities and defenses existing between the assignor and debtor at the time of the assignment.

Pleadings. Recoupment. Set-off. Promissory notes.  
Before Judge UNDERWOOD. Floyd Superior Court.  
March Term, 1880.

Reported in the decision.

D. B. HAMILTON ; J. BRANHAM, for plaintiff in error.

DABNEY & FOUCHE, for defendant.

CRAWFORD, Justice.

The Grangers' Life Insurance Company, which sues for the use of F. E. Davidson, brought suit on a non-negotiable promissory note for five hundred dollars, made by D. B. Hamilton, on the eighth day of October, 1877, and payable to said company.

Pleas of set-off and recoupment were filed by the defendant, which were stricken on demurrer, and he excepted.

The facts set up and relied upon by these pleas were, that in August, 1875, the defendant was induced by the false and fraudulent representations of the plaintiff, its agents and officers, to subscribe and pay over two hundred and fifty dollars to its capital stock. By reason whereof the said company became and was indebted to the said defendant for so much money had and received, and thereafter by reason of the said subscription of stock, defendant was induced to borrow the amount specified in the said note. And for the same reasons, defendant was induced to pay to the use of the company the further sum of fifty dollars, in prosecuting and attending to the business of the company which it also became liable to pay. All of which the defendant pleads in recoupment

and set-off. The defendant's plea was amended by alleging that the two hundred and fifty dollars subscription was obtained by fraud, which was well known to the said Davidson, as he was either president or vice-president of the company, and if the representations made had been true, the stock of the same would be of par value, but instead thereof it was valueless.

1. The judgment of the court in striking the plea of recoupment was a correct legal ruling. Recoupment as a defense must *spring* out of the contract upon which the plaintiff sues, and is confined to that. In this case the *suit* was brought on the *promissory note*, and any cross obligation or independent covenant arising under *that contract* would be available as a defense; but it is sought by the plea to recoup under another distinct, independent and antecedent contract. This cannot be done.

2. The plea of set-off, as is well known, extends to any mutual demands existing between the parties at the commencement of the action. The plaintiff in this action, as is alleged by the defendant, is indebted to him in the sum of three hundred dollars, which was obtained from him by fraudulent and false representations made by its agents and officers to induce him to subscribe for its capital stock, etc. If this be true, as the demurrer admits, in connection with the full statement of the facts set out in the plea, then why is it not a good cross-demand of the defendant against the plaintiff? It may have been considered that because the plaintiff sued for the use of F. E. Davidson, and that the set-off claimed was not in any way connected with the debt sued on, or the transaction out of which it sprung, that the right to plead a set-off did not exist. Indeed, such was the rule insisted upon in the argument. But an examination will show that such a set-off may be pleaded to a negotiable paper even, when received under dishonor, and sued by the holder or indorsee. How much stronger then is the right when the paper is not negotiable, and the suit is by the payee.

Notes without negotiable words are *always subject* to equities and defenses in the hands of *bona fide* purchasers existing between the assignor and debtor at the time of the assignment. It follows necessarily, that where one is the assignee, who takes such a paper with knowledge of the equities, as is alleged in this plea, he cannot escape the legal consequences of such assignment, nor defeat the rights of the debtor.

If a suit founded on a similar claim can be maintained against the plaintiff as a separate action, as was held by this court in 61 *Ga.*, 561, why cannot a set-off with like allegations against the same party, suing the defendant upon a note not negotiable, be pleaded? We see no reason. Of course all supervening rights and legal defenses to this cross action, which are intimated directly in the case referred to, are not lost by a change from a direct suit in one instance to a set-off in another.

Judgment reversed.

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SMITH vs. WADE.

(JACKSON, Chief Justice, was providentially prevented from presiding in this case )

Where to a rule in a justice court against a constable, he answered that he had been notified to hold the money to pay a claim put in therefor by a contestant, it was error to dismiss the rule.

(a). Where a *certiorari* was sued out on account of such dismissal, the proper judgment was to remand the case with instructions to the justice to try it on its merits, and decide it in conformity with the facts.

*Certiorari.* Practice in the Superior Court. Before Judge UNDERWOOD. Floyd Superior Court. January Term, 1880.

Reported in the decision.

W. D. ELAM, by brief, for plaintiff in error.

FORSYTH & HOSKINSON, for defendant.

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Moye vs. The State.

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CRAWFORD, Justice.

The plaintiff in error brought a rule in a justice court against J. L. Wade, the bailiff, calling upon him to show cause why he should not pay over five dollars and fifty cents in his hands collected upon a *fi. fa.* in favor of the movant. The bailiff answered the rule by showing that he had been notified to hold it to answer a claim put in therefor by a contestant. The justice, upon this answer, dismissed the rule. To this judgment *certiorari* was prayed and granted, and when the same was heard in the superior court, it was sustained upon the ground that the court below erred in dismissing the rule, when the facts should have been heard by the justice, and the money ordered to the party legally entitled thereto.

The order of the judge remanded the case with instructions to the justice to hear it upon its merits, and after the facts are made to appear, to decide the same in conformity therewith. To this ruling exceptions were filed and a writ of error sued out.

The judgment of the court is both authorized and required by §4067 of the Code.

Judgment affirmed.

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MOYE vs. THE STATE OF GEORGIA.

1. In a criminal case, the venue of the crime must be proved beyond a reasonable doubt.
2. To constitute larceny from the person it must appear that some article of value was wrongfully and fraudulently taken from the person of another privately and without his knowledge, with intent to steal the same. This crime cannot be completed if the owner of the property had knowledge that it was being taken.

Criminal law. Venue. Before Judge CRISP. Sumter Superior Court. October Adjourned Term, 1879.

Reported in the decision.

E. G. SIMMONS, for plaintiff in error.

C. B. HUDSON, solicitor-general, for the state.

CRAWFORD, Justice.

The defendant in the court below was indicted for the offense of "larceny from the person," and upon being convicted moved a new trial, because the testimony did not show that the offense was committed in the county of Sumter; and further, because the proof showed that if defendant were guilty of any offense it was not larceny from the person.

1. An examination of the testimony sent up with the record shows that the only proof touching the venue was, that the crime was committed in the lumber-yard of a Mr. Sloan, in the city of Americus; but it is nowhere shown that it was committed in the county of Sumter, where the defendant was tried. This must be done clearly and beyond all reasonable doubt. 56 Ga., 36.

2. To constitute larceny from the person, it must appear that some article of value was wrongfully and fraudulently taken from the person of another *privately and without his knowledge*, with intent to steal the same.

The prosecutor swears that at the time of the commission of the act he "was intoxicated, but not so drunk as not to know what was going on, and when he took the money from his vest pocket, he consented for him to do it, and if he had paid it back it would have been all right; did not consent for defendant to take the money out of his pocket, but did not object to his taking care of it, after he had taken it out."

This testimony is not sufficient to show that the taking was done privately and without the knowledge of the owner.



This case comes before us quite unsatisfactorily to enable us to arrive accurately at what was done on the trial, both as to the evidence and the grounds of the motion for a new trial. But we rule the case by the record.

Judgment reversed.

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WADE vs. THE STATE OF GEORGIA.

1. The verdict is supported by the evidence.
2. It was not contrary to the charge.
3. Where an isolated portion of the charge taken alone might be error, but is not so when taken in connection with the context, a new trial will not be granted on account of it.
4. *Alibi* as a defense involves the impossibility of the prisoner's presence at the scene of the offense, at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of such presence.
5. Counsel should not be allowed to argue facts not appearing from the testimony.
6. While it may have been error for the court to tell the jury in a criminal case that the law as read to them by counsel for the state and defense was the law of Georgia, it is impossible for this court to grant a new trial on that ground, when it does not appear what was so read. Especially will this not work a reversal where both sides admit that the killing was murder, and the sole question is whether defendant committed the act.
6. There is no law which prevents a bailiff from being a witness, and still retiring with the jury on a temporary absence from the courtroom, even though he may have been sworn and put under the rule.
8. This was not insisted on.
9. Testimony as to the measurement of a track is admissible without producing the measure itself in open court.
10. This was not insisted on.
11. On a trial for murder, it was not competent to show a conversation between the deceased and another, in which the deceased related that he had had a difficulty with a third party, not the prisoner, in which violent language had been used.

Criminal law. New trial. Charge of Court. *Alibi*. Practice in the Superior Court. Evidence. Before Judge WRIGHT. Baker Superior Court. May Term, 1880.

To the report contained in the decision it is only necessary to add the following: Wade was indicted for the murder of one J. L. Ready. One defense relied on was *alibi*. He was found guilty, and the jury recommended that he be imprisoned for life. He moved for a new trial, which was refused, and he excepted.

A. L. HAWES; H. C. SHEFFIELD; H. MORGAN, for plaintiff in error.

R. N. ELY, attorney-general; W. O. FLEMING, solicitor-general, by Z. D. HARRISON, for the state.

CRAWFORD, Justice.

The plaintiff in error having his motion for a new trial overruled, seeks a reversal of that judgment.

1. Because the verdict was contrary to evidence. There can be no better ground for a reversal than this, and we proceed to its consideration. The testimony shows that Wade said in *January* before the killing in *April*, that he wished Ready would die. They had a difficulty about two weeks before Ready was killed. He said to another witness a few days before the killing, that Ready would be found dead in his field some day, and nobody would know who killed him, and this he repeated about ten o'clock of the same day on which he was killed. About one hour and a half by sun he was seen to come out of his own house with what the witness took to be a gun, and going in the direction of Ready, and when he discovered the witness, appeared to want to hide it; he had also said to this witness that he would kill Ready if he fooled with him. About sun-down of that same evening Ready was killed in his field and nobody did know who did it. He was, however, killed with a rifle ball, and Wade

had borrowed, and had in his possession, a rifle belonging to Mr. Jeffries. The patching with which a rifle was loaded was found near the fence where the assailant fired. A rifle was seen at Wade's house the next morning after the killing with the fresh marks of burnt powder and smoke around the tube. Wade lived two and a half or three miles from Ready, yet he went on the night of the murder to the coroner's, and wanted him to go that night and hold the inquest; was *anxious* that it should be done. After the inquest was over, an examination by several persons took place of the locality from whence the shooting was said to have been done, by a witness who was at work with the deceased in the field when he was shot. There they found the tracks of a man, which, upon measurement, in length and width, corresponded with Wade's. There was a half sole or patch on one shoe with a hole worn in it, which left a raised place in the dirt where the track was made. Wade's shoe had such a half sole with just such a hole in it. These tracks were found in the fence corner from whence the gun was fired, and they were followed for a mile and a half towards Wade's house. When these tracks were being measured Wade was present; each man submitted to a measurement of his foot without trepidation, but when Wade's was measured he turned pale and trembled.

With this testimony before the jury we do not think that the verdict was contrary to evidence.

2. Because the jury found against this charge of the court: "If the state has shown you by the proof a chain of circumstances that point so directly to the man's guilt as to satisfy your minds, beyond a reasonable doubt, and you can't reasonably account under the evidence for the entire transaction upon any other reasonable hypothesis than that the man did the killing, then your verdict will be, 'We, the jury, find the defendant guilty.'"

This ground in the motion simply challenges in another form the sufficiency of the testimony to justify a convic-

tion. No objection is made to the charge itself, and the jury, by their verdict, say that under the evidence they can't account upon any other reasonable hypothesis for the killing of the deceased than that defendant was the guilty party.

3. For error in the following charge: "That when a number of witnesses testify to the same transaction, and there is a difference (an immaterial difference only) as to the main point in issue, it is rather an evidence of strength than weakness in the testimony for discrediting it."

Had this been all that the judge said in this connection, it might be subject to the criticisms of counsel made in the argument. But it was only a part of the sentence, and the judge adds, "A story told by two or three witnesses exactly word for word, and letter for letter, when human reason and human experience is applied to it, presents a suspicious phase." He makes further illustration qualifying and explaining his exact meaning, and we think committed no error.

4. Because counsel for the state read to the jury the following principle; "*Alibi* as a defense, involves the impossibility of the prisoner's presence at the scene of the offense, at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of such presence." The judge charged the jury that this was the law of Georgia, and we reaffirm it as having been held in the case of *Johnson vs. The State*, 59 Ga., 142.

5. That the court erred in refusing to allow counsel for the defendant to argue certain material facts to the jury, which the state failed to prove, and which the solicitor-general in his opening speech stated that he expected to prove by Dr. Hand and Mrs. Bailey.

To have allowed argument on material facts not in the testimony, either by counsel for the state or the defendant, would have been error.

6. In that the court erred in charging the jury: "The law as read to you from the books upon the table, both by defendant's and state's counsel is the law of the state of Georgia. I have charged you at length upon this point, they read you the law, and it was the law upon the points upon which they read it."

There may have been error in this charge, but it is not made to appear, because what the books contained, or what law was read to the jury, is not set out, and it is impossible for us to know whether it was the law of Georgia or not. Besides, it was admitted on the trial by counsel on both sides, that the killing was murder, and the case turned entirely upon who committed the act.

7. "Because James Irvin, a bailiff, being a prominent witness for the state, retired with the jury (upon a call of nature) as jury bailiff, and this too after he had been sworn with other witnesses, and the court had been requested to keep the witnesses separate."

No law was produced to us declaring that a bailiff might not be a witness in a case, and still retire with the jury upon a temporary absence from the court-room, even though he may have been sworn and "put under the rule."

8. This was not insisted upon.

9. Because the court erred in admitting the testimony as to measuring the tracks, over the objection of defendant's counsel, upon the ground that the measure itself was not produced.

It is competent to testify as to the measurement of a track without producing the measure itself in open court.

10. Was not insisted on.

11. That the court refused to allow counsel for defendant to prove a conversation between the deceased and the witness Guye, to the effect that the deceased had had a difficulty with a negro on the place about driving his wagon over the negro's cotton, who had requested him to desist, and Ready replied, "G—d d—you, I will

give you a load of buck-shot, that's the way I will dispose of you," and the negro replied, "I will be there when you do it."

We think that this testimony was clearly inadmissible under all the rules of evidence. It was but hearsay at best. The dying declarations of one are admissible under the well defined rules of law, and so may the sayings of one when they constitute a part of the *res gestae*, but a conversation such as this falls within none of the rules of law making it admissible.

Judgment affirmed.

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### LANIER vs. BROOKER.

1. Property held under bond for title, with part of the purchase money paid, was sold under an execution against the vendor. By agreement with the holders of the bond, a third party bought at the sheriff's sale, and gave them a bond to convey on re-payment of the purchase price; they failed to pay, but procured another to do so and take a deed from the purchaser; they gave him their note for the amount so paid, and he agreed in parol to convey the land to them on payment thereof. While the title stood thus, a judgment was obtained against him. Still later there was a second substitution of another in his place, similar to the first. *A fi. fa.* against the original holders of the bond for titles was levied, and the property sold. The purchaser continued to pay to the last holder of the title for the purpose of redeeming the lot. The holder of the title brought ejectment against him; and under an equitable plea, the jury found a money verdict against the defendant, with alternative of a *fi. fa.* against the land. *A fi. fa.* against the second taker of the title founded on the judgment above stated, was levied on the land, and the purchaser at the second sheriff's sale, being also defendant in ejectment, claimed:

*Held*, that the agreement to convey title made by the second holder of the title to the original holders of the bond for title was without consideration, and not binding.

2. Even if binding, the title was nevertheless in him by actual purchase, and the lien of the judgment against him attached.

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Lanier *vs.* Brooker.

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3. The original holders of the bond for title did not have either a fee simple or mortgageable interest in the land which they could convey to the purchaser at the first sheriff's sale, or those who were substituted for him, and therefore were not protected by the act of 1871-2.
4. On the trial of the claim case arising under the *fi. fa.* against the second holder of the title, the record of the ejectment cause between the third holder and the claimant was not admissible.

Judgments. Lien. Contracts. Evidence. Title. Claim. Before Judge McCUTCHEN. Whitfield Superior Court. April Term, 1880.

A *fi. fa.* in favor of Lanier against Varnell, founded on a judgment rendered in May, 1875, was levied on certain land, and Henry Brooker claimed. The following are, in brief, the facts:

Bacon sold the lot of land to J. W. & W. H. Brooker on June 1st, 1870. About one third of the purchase money was paid in cash, and a bond to make title on payment of the balance was given. In October, 1870, one Davis obtained a judgment against Bacon. In April, 1873, Bacon obtained a judgment against the Brookers for the balance of the purchase money. In April, 1874, the property was sold as the property of Bacon, and bought by Prater. This was done at the request of the Brookers, and Prater gave them a bond to make titles if they should repay the price paid by him. This they failed to do; and in November, 1874, Varnell advanced the money, and took a deed from Prater. On the same day the Brookers gave to Varnell the following instrument:

"\$425.00. By the fifteenth day of December next, we promise to pay, or cause to be paid, to R. N. Varnell, four hundred and twenty-five dollars for value received. For the full security of this note, and the payment thereof, a mortgage or lien is hereby given on lot of land number 311, eleventh —, third section of Whitfield county, Georgia, together with all the rights, and appurtenances in anywise belonging. Dalton, Georgia, November 6th, 1874.

"J. W. & W. H. BROOKER."

Varnell made a parol promise to convey to the Brookers on payment of the money so promised. They failed to pay it. In July, 1875, Varnell conveyed the land to Oxford, who paid the amount of the Brookers' note. In November, 1875, a *fi. fa.* in favor of one Cannon, against J. W. & W. H. Brooker, which had been levied on the land as belonging to them, sold it, and Henry Brooker bought it. It appeared that after this Henry Brooker paid about two hundred dollars to Oxford towards redeeming the land. In 1878, Oxford brought ejectment against him, the Brookers having held possession ever since the purchase from Bacon. An equitable plea was filed, and the jury found that Brooker pay to Oxford three hundred and forty-eight dollars and seventy-eight cents principal, or in default thereof that execution issue, the property be sold, and the said amount be realized from the property.

On the trial of the present case, the court admitted in evidence the record in the ejectment suit, and charged, in effect, that if Varnell took and held the title to the land as security only for the payment of said note, holding the land in trust only for that purpose, and if they (the Brookers) did redeem, or procure some one else to redeem for them, by paying all the money and taking Varnell's deed to the land, then, while so held by Varnell, it was not subject to the lien of a judgment against him; and even if the Brookers did not redeem in terms of their contract, yet if Varnell did not elect to take advantage of their failure, but extended the time until they did redeem, the lien of a judgment against him did not attach.

These rulings were assigned as error.

W. K. MOORE, for plaintiff in error.

D. W. HUMPHREYS, for defendant.



CRAWFORD, Justice.

This was a claim case growing out of the levy of an execution against Varnell, on a lot of land, number three hundred and eleven, in the eleventh district, third section of Whitfield county, to which Henry Brooker claimed title. Upon the trial of the case the jury, under the charge of the court and the evidence submitted, found the land not subject, and for the errors alleged to have been committed on the trial the plaintiff in *fi. fa.* excepted.

Though there was much evidence introduced, and the record necessarily voluminous, we think the law of the case neither doubtful nor involved in obscurity by the multiplicity of facts which surround it.

J. W. Bacon sold this land to J. W. & W. H. Brooker, who paid part of the purchase money, gave notes for the balance and took a bond for title. Afterwards the land was levied on and sold as Bacon's, bought by B. F. Prater, to whom the sheriff made a deed. He agreed with the Brookers, who had requested him to buy it in order that they might save themselves, to pay for it and let them have it upon their payment to him of the purchase money, which agreement was put in the shape of a bond to convey the land to them whenever they paid back to him the money thus expended for the land. They failed to pay him, and it was agreed between them that R. N. Varnell pay Prater for the land, take the title, and they would give him their note for the money, specifying the consideration therein. Varnell, on the sixteenth day of November, 1874, paid of his own money the amount which Prater paid for the land and took a deed therefor. So that on that day he had a clear, undisputed legal title in himself to this lot of land, with the purchase money all paid, coming down to him from Bacon, the vendor, to the Brookers, who had endeavored, and were still endeavoring, to protect the money which they had put into the

land when they bought it from Bacon. But their real trouble was, that neither Prater nor Varnell was under any *binding legal obligation* to convey to them the land when they should pay the amount that was paid for the same at the sheriff's sale. The bond was but a voluntary agreement without consideration, and therefore not binding upon Prater, and Varnell never received a dollar, or the promise of one, for the conveyance which he was to make.

Even if that view should be considered untenable, the legal effect of all that was done did but carry Bacon's title, and that of those who held under him, into Prater and then into Varnell, with a verbal promise, unsupported by any consideration, to convey the land to the Brookers if they should pay him the money therefor which he had paid to Prater.

Supposing, however, his promise to be *binding* upon him as to the Brookers, yet whilst the title was thus in him, to-wit: on the twenty-second day of May, 1875, Lanier, the plaintiff in *fi. fa.* in this case, obtained the judgment against him upon which this execution issued, and with which the levy was made upon the land. Varnell then by the proof was the real owner of the land, holding the title, with the purchase money paid out of his own means, from November, 1874, to August, 1875.

Admitting that the Brookers could have forced Varnell to have conveyed the land to them, it could have only been done upon the payment to him of the full amount of money which he paid for his title. It was his till they redeemed.

The claimant rested his title upon a deed made by the sheriff, who had sold this land as the property of the Brookers, which deed was dated November 2d, 1875, and upon the record of an action of ejectment brought by J. D. Oxford, the grantee of Varnell. It is to be remembered that the land was sold as Bacon's, their vendor, in April, 1874.

The facts of this case put it outside of both the letter and the spirit of the act of 1871-2. The Brookers, under that act, never had any mortgageable or fee-simple interest in the land which they could have conveyed to Prater or Varnell. They never could have brought themselves within its operation without having title, and even if they had had title, and conveyed it to the judgment debtor, the lien of such judgment would have attached, unless they had kept themselves within the provisions and were protected by the act referred to.

Taking the case as it is—suppose that on the very day when this land was sold, after Prater had bought, paid for, taken the deed, and given his bond as he did, a *fi. fa.* against him had been levied upon it, what would have prevented its sale? Nothing that appears in this record. When Varnell, against whom there was an execution, got the title and paid the money for it, there was nothing higher in his title, as shown by the record, to prevent the levy and sale in satisfaction thereof.

Our judgment, therefore, is that the charge of the court was error—the admission of the record in the ejectment suit improper, and that the judgment be reversed. .

Judgment reversed.

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BECK vs. THE STATE OF GEORGIA.

1. The verdict is supported by the evidence.
2. That the principal witness for the state, on whose testimony the conviction largely rested, had had a serious personal difficulty with the prisoner, and testified under strong feelings of malice, and that defendant's counsel did not know of the difficulty until after the trial, furnished no ground for new trial. The defendant knew the facts and should have communicated them to his counsel.

Criminal law. New trial. Before Judge LESTER. Dawson Superior Court. April Term, 1880.

Reported in the decision.

M. L. SMITH ; H. C. JOHNSON ; WIER BOYD, for plaintiff in error.

THOS. F. GREER, solicitor-general, for the state.

CRAWFORD, Justice.

Dawson Beck was indicted for, and convicted of, malicious mischief, in that he wilfully shot and killed a hog which was the property of another. He moved for a new trial because, as he alleged, the evidence was insufficient to authorize a verdict against him, and on the further ground that one of the witnesses against him, and the only one who testified to the killing of the hog, had a serious difficulty with him immediately preceding the finding of the bill of indictment, and that his testimony was given in under strong feelings of malice, and of which his counsel was ignorant until after the trial.

The judge below, upon considering the grounds taken, held them to be insufficient, and this court is called upon to reverse that judgment.

1. Upon examining the testimony we find that the shooting of the hog is sworn to positively by a witness who says that he saw it done, describes the hog, and names the place where it might be found. The *owner* went to the place, and there found it ; he saw no bullet-hole, though he says that at that time it was pretty well covered over with snow, which he did not brush entirely away.

Henry Fouts and John W. Beck, also went to the place where it was, each one of them examining it *with his foot*, Beck, the father of the accused, more carefully than the other witness, and their testimony was that they *did not see any* bullet-hole or marks of violence about it.

It is claimed, therefore, that because these witnesses did

not see where the ball entered, that the jury should have acquitted the defendant. It appears from the evidence in the record, that the examination made was not such as to make it absolutely certain that the hog was not shot, and that it was made at a time, and under circumstances not well calculated to ascertain whether or not it had been penetrated by a ball. It is to be noticed, also, that neither of these witnesses swears positively that there was not a bullet-hole to be found; they only swear that they did not see any. Such proof will not overcome the positive statement of a witness unimpeached, who swore that he saw it done.

2. That there had been a difficulty between a witness for the state and the prisoner, and that the witness testified against him, whether under strong feelings of malice or not, was a fact well known to the party himself, although it *may* have been unknown to his counsel, and if he did not disclose it to them at a time when he might have gotten the benefit of it, he must abide the result of such failure, for it affords no legal ground upon which to grant a new trial.

Judgment affirmed.

# INDEX.

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## ACTIONS.

1. Minor children may by Code, §2791, recover for the homicide of the mother as well as of the father. *Atlanta & West Point R. R. Co. vs. Venable, next friend*, 55.
2. Where a city council suspends its ordinance forbidding the running at large of cattle, one gored by a cow in the street has no cause of action against the city. No cause of action arises from negligence in the exercise of legislative functions by municipality. *Rivers vs. City Council of Augusta*, 376.
3. A tenant has no cause of action to recover rents paid from his landlord whose title has failed, where he has not been disturbed in the enjoyment of his term. *Dwinell vs. Brown*, 476.
4. A sheriff has no right of action against a purchaser at sheriff's sale who was enjoined from paying over the money, and afterwards a decree rendered making said injunction perpetual, even where he charged misconduct against said purchaser at said sale, and in allowing said decree. A declaration to this effect is demurrable. *Cherry, sheriff, vs. The Planters' Warehouse Co. et al.*, 535.
5. When bonds are feloniously taken and disposed of, the prosecution of the taker is not a condition precedent to a suit to recover them from a third person, and a judgment in such suit would conclude the question of such prosecution on a bill in equity based thereon. *The Merchants' & Planters' National Bank et al. vs. The Trustees of the Masonic Hall*, 603.
6. Failure to sue within twelve months from its record on a contractor's lien against a railroad, is not excused because such railroad has been seized by the governor for default on interest on bonds; such seizure does not abrogate its obligations to others, and such failure destroys lien. *Cherry, for use, vs. North & South R. R.*, 633.

7. Where breach of warranty is unmixed with fraud, the remedy is by suit on the warranty; when there has been fraud in exchange of property, party defrauded may sue on the warranty or bring suit to recover the property exchanged. *Dawson vs. Pennaman*, 698.

#### ADMINISTRATORS AND EXECUTORS.

1. If executors fraudulently bought realty and personalty belonging to the estate at their own sale, and one of them conveys his interest in the realty to a purchaser, with notice, such purchaser will be not liable to the same extent as the executor, but only for the realty purchased. *Willis et al. vs. Foster, trustee*, 82.
2. Purchase by executor at his own sale, not void; it may be set aside by parties injured thereby; until that is done, legal title is in purchaser. *Thornton, ord'y., vs. Willis, trustee*, 184.
3. Possession of note made by deceased by his administrator, who is also executor of another estate, raises no presumption of its payment where he is enforcing same as such executor against the indorser, his co-administrator. *Haywood vs. Lewis, executor*, 221.
4. Where a note against one individually is sued in the short form, declaration cannot be amended by alleging same to be given by executrix for money used for benefit of estate under a provision in the will directing it to be kept together, especially when amendment was barred. *Lynch, adm'r, vs. Kirby, adm'r*, 279.
5. An executor cannot bind the estate by a note given as such. *Ibid.*
6. After division of lands by commissioners on application of administrator and return made to the ordinary, the share allotted to an heir is subject to judgment against him. That administrator never accepted the heir's receipt for the land makes no difference. *DuBose, adm'r, vs. Cleghorn, Herring & Co. et al.*, 302.
7. Mortgage with power of sale, on default, did not vest such power as would survive the mortgagor and take precedence of dower, year's support, expenses of administration, trust debts, etc. *Lathrop & Co. vs. Brown, ex'r, et al.*, 312.
8. That part of money was used to purchase property mortgaged to secure it, makes no difference, there being no agreement as to it. *Ibid.*

9. Where testator rents and assigns rent note, and then re-rents to same tenant, and executor collects rent under second contract, and with it pays year's support, etc., and tenant becomes insolvent, the estate is liable for amount so collected before payment of money entrusted to testator. *Ibid.*
10. Where a will provided a life estate in entire estate for the widow, with remainder in certain land, and for a distribution of the personalty among the legatees at her death, but that the negroes were not to be sold, but equally divided as possible, differences in their value to be equalized in money, said will did not contemplate the retention of funds by the executor for purposes of equalization at widow's death, but that that should be done by inter-payments between the legatees; where, therefore, executor returned certain cash left by testator at death as on hand in 1857, and never paid it over and died in 1866, and his estate remained unrepresented until 1876, and the widow died in 1877, a suit brought by administrator *de bonis non* of original testator in 1879, is barred by the act of 1869. *Summerlin et al., adm'r, vs. Dorsett, adm'r, 397.*
11. Courts of ordinary are courts of general jurisdiction in matters of administration, and a judgment granting letters cannot be collaterally attacked on the ground of non-residence of decedent in the county, especially where it recites that deceased was of said county. The attack must be made in the court rendering judgment. *Tant et al. vs. Wigfall, 412.*
12. Where an executrix has contracted an account for plantation and family supplies, money, etc., and gives her note as executrix therefor, and intermarries and dies, there being no provision in the testator's will charging the land for such a debt, and it not appearing that said executrix or her estate was insolvent, or that said account permanently benefited testator's estate, it being alleged that testator, in his last illness, asked complainant to assist his wife, the executrix, to run said account, and that this was the main inducement to give credit; a settlement between the legatees and the administrator *de bonis non* whereby they agree to take all the estate, mainly land, and pay the debts, the land to be turned over without first paying the debts, will not be enjoined, nor payment of this debt decreed out of said estate. *Deas, adm'r, vs. McRea, adm'r, et al., 531.*



13. Where there are conflicting claims as to intestate's estate, and the same is insolvent, and the debts are of doubtful priority, and some debts have been paid by administrator, he supposing estate to be solvent, and homestead has been set apart in all the realty, and a year's support has been allowed, some perishable property has been sold, some accounts have been or can be collected and others cannot, one debt has been reduced to judgment and the *fi. fa.* levied on said realty, and other suits and complications will follow, a bill to marshal assets, enjoin creditors, and for direction as to administration, is not demurrable. *Johnson, adm'r, vs. Flanders et al.*, 691.

#### ALIMONY.

1. Alimony is granted in pending divorce suits and suits where there is a voluntary separation, and where husband abandons wife. In these latter cases equity may, by decree, compel husband to make provision for support of wife and children. *Gray Bros. et al. vs. Gray*, 193.
2. Injunction granted as well against others co-operative with him as against husband to prevent alienation of his property to defeat alimony. *Ibid.*
3. Alimony may be allowed out of any property mentioned in the schedule, and is not confined to that owned by husband at date of verdict. *Halleman vs. Halleman*, 476.
4. A verdict for alimony is not illegal because it does not provide for the payment of husband's debts; that may be considered on question whether the allowance is excessive. The decree is not good as against debts created before the schedule was filed. *Ibid.*

#### AMENDMENT.

1. There is no need for action of judge on an amendment except where the opposing party's rights may be affected by the amending party's negligence. *Strange, adm'r, vs. Barrow et al., ex'rs*, 23.
2. Amendment may be filed and served at first term, or after a continuance, or at any time when questions of negligence do not arise, without leave or the imposition of terms. *Ibid.*
3. A copy of a lost amendment filed at a previous term, may be established in the absence of an entry on the bench docket or order on the minutes allowing same, and on evidence other than the records of the court. *Ibid.*

4. The copy of the note sued on attached to the declaration can be amended so as to conform to the original. *Chapman vs. Skellie et al.*, 124.
5. Counter-affidavit to a distress warrant is pleading so far as to be amendable by adding a plea of bankruptcy, if it operates to discharge the debt. The ruling in 55 Ga., 56, will not be extended. *Rountree et al. vs. Rutherford, adm'r*, 444.
6. The Code provides that amendment may take place of supplemental bill, so an amendment to a bill against a bank to reach equitable assets, by a creditor with an execution returned unsatisfied, requiring the president to account for assets in his hands to pay the debt, was proper. *The Merchants' and Planters' National Bank et al. vs. The Trustees of the Masonic Hall*, 603.
7. Amendment before answer, discovery may be waived by. *Ibid.*
8. A proper amendment does not postpone the trial term; matter of giving time or continuing rests in the court's discretion. *Ibid.*
9. An amendment not adding a new cause of action, but giving more certainty to that already brought, was proper. *Cooper, adm'r, et al. vs. Lockett*, 702.  
*See Mortgage*, 3.

APPEAL. *See Jury*, 9; *Justice Courts*, 6.

#### ATTACHMENTS.

1. Discrepancy between attachment and levy as to whose possession property was in, immaterial after replevy. *Cooper, adm'r, et al., vs. Lockett*, 702.

#### ATTORNEY AND CLIENT.

1. Communications made by a prosecutrix to an attorney in contemplation of employment although before it, cannot be inquired into, but if she repeat a part of a conversation so had on direct examination, she may be required to give it all, and if she refuses on the ground that it would criminate her, the whole conversation should be excluded. *Young vs. State*, 525.
2. The relation of attorney and client is one of trust and confidence. Where an attorney to collect a note from principal was himself second indorser, the statute of limitations ran as to him from the time when the debt was not collectible

from principal and the attorney's liability was apparent to the client. *Freeman, ex'r, vs. Bigbam, 580.*

3. Client though bound to ordinary diligence in discovering principal debtor's insolvency, is entitled to his attorney's advice and knowledge on that subject. *Ibid.*
4. Attorney becoming judge, the relation of attorney and client, ceases between him and his client while he is judge. *Ibid.*
5. When attorney represents party in court with his knowledge and without objection, presumption is that such services were rendered with his consent and under an implied contract to pay reasonable worth of same, but it does not follow that if the attorney was employed by only one, there being more than one party on a side, and the others knew that attorney represented the whole case and his services benefited and were accepted by them, that to avoid liability they should have notified attorney that they would not be liable. *Simms, ex'r, vs. Floyd, 719.*

See *Practice in the Superior Court, 39.*

AUDITOR. See *Practice in the Superior Court, 54.*

#### BAILMENT.

1. Where a town issued \$30,000 of bonds and contracted with a broker to give him the use of \$7,500 of them, he to keep \$7,500 at par as a circulating medium, and redeem them when presented and return to the town, when it should redeem \$7,500, and the broker became bankrupt, having on hand \$4,900 of the bonds; in a contest for possession thereof, between the town and the bankrupt's assignees: *Held*, such contract created a trust in the nature of a bailment, and the broker being unable to fulfil the same, the town should recover. *Cabaniss et al., assignees, vs. Ponder, mayor, et al., 134.*
2. That the bonds in dispute and those delivered to the broker are not identical is immaterial. The contract was for use of entire issue and a return in kind. *Ibid.*

#### BANKRUPTCY.

1. A distress warrant becomes *mesne* process on filing of counter-affidavit with bond, and the debt is discharged by bankruptcy. *Rountree et al. vs. Rutherford, adm'r, 444.*
2. Bankruptcy of principal on bond for eventual condemnation money in a suit, if discharging principal, discharges surety. *Ibid.*

3. Bankruptcy must be formally suggested to obtain a stay of case pending in state court, to await discharge. Knowledge in other cases, or personal knowledge of judge of bankruptcy of defendant, not sufficient. *Howell vs. Glover*, 466.
  4. A plea of bankruptcy to a suit brought in Georgia on a Tennessee judgment, it appearing that pending Tennessee suit defendant was adjudged a bankrupt, but failed to plead that fact or ask a stay of proceedings, and judgment was rendered and he subsequently discharged, bars a recovery. The Tennessee judgment was no new debt, but a security for the old, and of itself without force in Georgia. *Anderson vs. Anderson*, 518.
  5. Bankrupt's after-acquired property not subject to judgment older than bankruptcy, though not proven in bankrupt court. *McLendon vs. Turner*, 577.
  6. When the judge or register grants an exemption in bankruptcy, it is as free from levy and sale without further proceeding as if set apart by ordinary. *Ross, adm'r, vs. Worsham*, 624.
  7. Judgment on contract made prior to constitution of 1868 and the bankrupt act, homestead set apart under both is subject thereto. *Dixon vs. Lawson et al.*, 661.
- See *Trusts*, 3.

BANKS. See *Corporation*, 7, 8; *Equity*, 32, 49.

BILL OF EXCEPTIONS. See *Practice in the Supreme Court*.

#### BONDS.

1. Where criminal recognizance was conditioned that the principal appear at a specified term of court, and there was nothing as to further appearance, appearance at specified term discharged the bond and relieved securities from liability for non-appearance of principal at subsequent term. *Colquitt, gov., vs. Smith et al.*, 341.
- See *Contracts*, 12, 13, 14.

CARRIERS. See *Railroads*, 10, 11.

#### CASES QUESTIONED.

1. The ruling in 55 *Ga.*, 56, will not be extended. *Rountree et al. vs. Rutherford, adm'r*, 444.

CAVEAT EMPTOR. See *Estoppel*, 2.

## CERTIORARI.

1. Answer to *certiorari* not replying specifically to petition, excepting party must specify defects in writing, and notify his opponent thereof. *Franklin vs. Kaufman et al.*, 260.
2. That juror in justice court was a talesmen and his name not on the jury list or in the box, no ground for sustaining *certiorari*. *The Western and Atlantic Railroad vs. Steadly*, 263.
3. Notice that plaintiff "had applied for and had issued a *certiorari* returnable to the next term of the court," is not sufficient notice of sanction of *certiorari*, and it was properly dismissed. *Ayer & Co. vs. Kirkland*, 303.
4. A *certiorari* is not brought until the petition is filed, and if filed more than three months after decision complained of, will be dismissed. *Shaw vs. Griffin*, 304.
5. A *certiorari* will not be allowed, although brought within three months from its rendition, to the original judgment in a justice court, where the same was appealed to a jury and on the trial the appeal dismissed. *Miller vs. Hensley*, 556.
6. Judgment finally disposing of case should not be made on *certiorari* where issues of fact are involved; case should be remanded. *Sapp vs. Adams, superintendent*, 600.
7. Where evidence shows fraud, that question should be left to jury in justice court. In a trover suit to recover property exchanged, based on fraud practiced in exchange, granting of non-suit is good ground for *certiorari*. *Dawson vs. Penaman*, 698.
8. Error assigned being that the court below should have granted a *certiorari* to the justice's judgment against a railroad for killing a cow, on the ground that the presumption against the railroad had been rebutted, the justice's answer is necessary to make such error appear to this court. *Georgia Railroad Co. vs. Fisk*, 714.
9. Under evidence stated in the petition for *certiorari*, it did not appear that the presumption against defendant was rebutted. *Ibid.*
10. Where a justice dismisses a rule against a constable, he answering that he had been notified to hold the money to pay a claim put in therefor, it is error, and on *certiorari* the superior court should remand the case, instructing the justice to try it on its merits, and to decide it in conformity with the facts. *Smith vs. Wade*, 754.

## CHARGE OF COURT.

1. A charge upon the hypothesis of defendant's having been found in possession of deceased's pistol the day after the homicide, where the evidence disclosed that pistol was found in a house occupied by the defendant jointly with others, and not alluding to such joint occupancy and their equal facilities for concealing, is error. *Hall vs. The State*, 36.
2. Charge that proper diligence required the agents of a railroad company to do a certain act, commanded by statute and having a material bearing on the case, is not error. Thus in a suit for damages to a dray by a train at a street-crossing in a city, the court may charge that diligence required the locomotive bell to be rung in approaching said crossing, the negligence of defendant's agent being in question. *The Atlanta & West Point R. R. Co. vs. Wyly*, 120.
3. Where the case complainant made, involved only defendant's conduct as to the excess of certain notes turned over to him after satisfying complainant's indebtedness, whilst defendant's case was that he held said notes as collateral security to certain *fi. fas.*, it was not error in the court to charge generally as to the duty of the holder of collaterals, and not to charge only as to defendant's duty as respects said excess. *Phillips vs. Lindsey*, 139.
4. Where the general charge covers the law, special instructions, if desired, should be asked for. *Rush, adm'r, vs. Ross, adm'r*, 144.
5. Where there is no evidence of confessions it is error to charge that they should be received with great caution. *Jones vs. State*, 147.
6. When the evidence presents solely the question of murder or innocence, the court need not charge concerning other grades of homicide. *Ibid.*
7. Where the deed conveys four-sevenths of land in trust to one party and three-sevenths not in trust to another, it is error to instruct jury that they may find all was trust property regardless of the deed, *Hathorne et al. vs. Maynard*, 168.
8. Charge should not assume the existence of facts; where request is made which does, it should be qualified by adding, if they did so exist. *Ibid.*
9. Where plea only claims recovery of usury on notes in suit, charge restricting recovery to that, right, although usury had been

- paid on other notes between the same parties. *Haywood vs. Lewis, ex'r, 221.*
10. Requests not warranted by evidence properly refused. *Fleming vs. Hill, 247.*
  11. Exception to the entire charge not considered unless charge as a whole erroneous. *Ryan et al. vs. Gray, adm'r, et al., 304.*
  12. Where charge as a whole is correct new trial refused, although minor inaccuracies exist. *Brown vs. State, 332.*
  13. An exception to the entire charge will not be sustained unless same is erroneous in its entirety. *Roberts vs. State, 430; Sparks vs. Roberts, 571.*
  14. It is not error for court to remind jury of the importance of their duty both to the prisoner and society. *Ibid.*
  15. A charge in an equity case that complainant must clearly and conclusively prove the disputed point, where the defendant denied the right claimed, is error; especially where the defendant's answer was not sworn to and discovery was waived. *DeLaigle vs. Denham, 482.*
  16. A charge that the jury might give the prisoner's statement just such force as they thought right, believing all, part, or none of it, just as they did the testimony of a witness, substantially complies with the act of 1878-9, providing that the jury may believe the statement in preference to the testimony. *Jones vs. State, 506.*
  17. Charge not warranted by evidence should not be given. *Ibid; Richards vs. Butler & Carroll, 593; Peek vs. Wright, adm'r, 638.*
  18. A charge that certain testimony is sufficient to establish a fact is error; what testimony is or is not sufficient is a question for the jury. *Ibid.*
  19. Charge improper taken by itself, if proper when taken with its context, is no ground for new trial. *Ibid; Wade vs. State, 756.*
  20. In a case of circumstantial evidence, defendant's counsel may use a certain book in argument to the jury, and the state's counsel may disparage it. The court should express no opinion thereon, but should charge the jury the principles of law applicable to the case. *Ibid.*
  21. It is error for the court to read to the jury from a volume of supreme court reports that "juries are generally too reluctant to convict on circumstantial evidence." *Ibid.*

22. Written charge may be required in felony case ; when delivered it becomes an office paper, to be filed, and is accessible to all persons interested. *Ibid.*
23. Written charge not being asked, that it was not written or filed is no error. *Ibid.*
24. Charge already given need not be repeated on request. *James vs. Kiser & Co., 515.*
25. That the judge in a criminal case charged that a certain point was conceded, when it really was immaterial, no ground for new trial. *Jones vs. State, 621.*
26. Charge put in an interrogative or argumentative way, but not so as to injure defendant, no ground for new trial. *Ibid.*
27. Charge not required by evidence need not be given. *Crine vs. Tifts & Co., 644.*
28. Charge, in a murder case, not amplified as counsel desire on a given point, no request being made for a charge on such point, and the charge given containing, substantially, what counsel desire, no ground for new trial. *Powell vs. State, 707.*
29. Where the court refused a request to charge, and stated in the jury's hearing that there was no evidence to support such request, there being such evidence, it is error. *Simms, ex'r, vs. Floyd, 719.*
30. It may be error for the court to tell the jury in a criminal case that the law as read to them by counsel was the law of Georgia, but this court cannot grant a new trial on that ground when it does not appear what was so read ; especially when both sides admit that the killing was murder, and the sole question is, did the defendant do it? *Wade vs. State, 756.*

#### CLAIM.

1. Plaintiff in *fi. fa.* cannot tack the time land was held under an illegal levy to a subsequent levy in order to prevent the four years' bar of the statute of limitations in favor of a purchaser without notice, even though such purchaser has been a claimant under both levies. The Code omits the word "peaceable" as qualifying the possession, and land must be seized by legal levy before the bar of the statute attaches. *Zimmer vs. Dansby, 89.*
2. Levy "on nine hundred acres of land as the property of James B. Hart, one of the defendants, said property being



- situated and in the vicinity of Union Point, Greene county, Georgia," if objected to before sale, would be insufficient; after sale and purchaser's rights have intervened, on trial of claim case, sufficiency should be left to jury, and the *fi. fa.*, with this entry, admissible. *Williams & Co. vs. Hart*, 201.
3. Sheriff's entry in levy as to who was in possession at date thereof, evidence of that fact; entry as to who died in possession, not evidence, and such entry will not change *onus*. *Ibid*
  4. Understanding of witness without statement of facts on which based, as to what was levied on and sold, inadmissible. *Ibid*.
  5. Declarations made by debtor in possession of property once his, after formal title parted with, which creditor seeks to condemn as fraudulently conveyed, admissible in evidence against claimant. That claimant bought at sheriff's sale makes no difference. *Ibid*.
  6. Cotton in field not matured is not subject to levy and sale. A purchaser of it in its then condition from defendant in *fi. fa.* gets a good title as against an older judgment against his vendor. *Scolley vs. Pollock*, 339.
  7. Levy showing the defendant in *fi. fa.* in possession, if the claimant does not assume the burden of proof and proceed, and the plaintiff does, by direction of the court, he is entitled to open and conclude. *James vs. Kiser & Co.*, 515.
  8. Land claimed against an administrator, verdict finding land not subject, but reserving the widow's dower, is illegal and inconsistent. *Hall, adm'r, vs. Spivey*, 693.
  9. Affidavit to claim interposed to an administrator's sale, sets forth title held under an alleged promise to release dower and alleges a failure so to do, and prays widow be made a party and a deed to other lands made as consideration for such release be delivered up and canceled, the widow cannot be made a party, so as to litigate her title in claim case between the administrator and claimant. *Ibid*.
  10. Mortgage executed to secure a debt to claimant, and prior to rendition of plaintiff's judgment, defendant surrendered the mortgaged property in payment of said debt, the title passed though the possession never changed, and though no written conveyance was made until after the judgment. The question of good faith is for the jury to determine. *Miller & Ellis vs. Johnston*, 743.
  11. Trial of claim case under a *fi. fa.* against the second holder of title, the record of an ejectment cause between the third

holder and the claimant was not admissible. *Lanier vs. Brooker*, 761.

#### COLLATERAL SECURITY.

1. Holder of collateral bound to use reasonable diligence in connection therewith. *Colquitt & Baggs vs. Stultz*, 305.
2. If collateral be notes, or like evidences of debt, diligence in collection must be shown. If stock, diligence does not require it to be sold on default of debtor, and subsequent depreciation will not relieve debtor, he not having demanded sale. *Ibid*.

#### COMPROMISE AND SETTLEMENT.

1. Trustee who mingled his own with trust funds, may settle with *cestui que trusts* by conveying to them property equal in value to the *corpus* of estate and the profits. If they are in possession of such property, claiming and enjoying it, it is evidence of their acceptance of settlement. *Hathorn et al. vs. Maynard*, 168.

CONFESSIONS. See *Criminal Law*, 1, 2.

CONSIDERATION. See *Promissory Notes*, 3.

#### CONSTABLE.

1. Justice of the peace, not a candidate, must be one of the managers of constable's election. Such officer acting only a part of day, renders election illegal. *Franklin vs. Kaufman*, 260.
2. Failure to elect constable, or the elect fails to qualify, there is a vacancy and the magistrate should appoint. A new election is unauthorized. *Ibid*.

#### CONSTITUTIONAL LAW.

1. Contracts between a railroad and a telegraph company, granting the latter the exclusive use of its right-of-way, are against public policy and void, as in restraint of trade and tending to create monopolies. *The Western Union Telegraph Co. vs. The American Union Telegraph Co.*, 160.
2. Railroad companies possess their rights-of-way by the exercise of the right of eminent domain, granted by the state for specified uses. Such property so condemned to the public use, cannot be conveyed to another company for its exclusive interests and in antagonism to the public interest. *Ibid*.

3. Imprisonment under bail process, in a case where an alternative verdict has been found for so much money, to be discharged by the delivery of the property in twenty days, and the defendant has failed so to deliver, is unconstitutional. After said time without such delivery, the verdict became absolute, for money, and further imprisonment would be for debt. *Southern Express Company vs. Lynch*, 240.
4. By constitution of 1877, the justices and notaries public must hold court at the same time and place in their respective districts. *Tarpley vs. Corput*, 257.
5. "An act to extend the provision for alimony to the family of the husband, to provide for the custody of the children, and for other purposes connected therewith," contains but one subject matter and no matter different from that expressed in its title, and is constitutional. *Halleman vs. Halleman*, 476.
6. An act of the general assembly, furnishing certain convicts to a railroad company to work, free of charge, said road to give bond to entirely provide for them and their safe keeping, is not such a "donation or gratuity" within the meaning of the constitution, as requires that such act should be passed by a two-thirds majority of both branches of the general assembly, and the yeas and nays entered on the journals. *Georgia Penitentiary Co. No. 2 et al. vs. Nelms, principal keeper et al.*, 499.

CONSTRUCTION. See *Contracts*, 44.

#### CONTINUANCE.

1. Motions for continuance are addressed to the sound judgment of the presiding judge, which will not be controlled unless abused. *Johnson vs. State*, 94.
2. On a motion for continuance for the absence of a witness, it is not permissible to inquire what other witnesses will testify in respect to the subject matter of the absent witness' testimony; but a counter-showing may be made as to what that testimony will be, and to that end what he swore on a former trial touching the same facts is admissible. *Ibid.*
3. Continuance not granted to parties in justice court for sickness of material witness for whom no subpoena had been issued, and whom the justice had seen shortly before court, apparently well. *Rivers vs. Hood*, 302.

4. Judge having a discretion refused continuance, holding that he is bound by an inflexible rule of law, his decision will be more readily reversed. *Brown vs. State*, 332.
5. General but not inflexible rule is that where witness is out of jurisdiction, a continuance will be refused; but where witness has promised and is expected to attend in reasonable time, and his testimony is material, and diligence is shown, a continuance or postponement should be allowed. *Ibid.*
6. Where counsel are appointed to defend after the case is called, on a trial for murder, counsel previously representing defendant then announcing that he no longer did so, and state in their place that they cannot, by reason of the shortness of time, do justice to the prisoner, the evidence being circumstantial, a postponement to a later day should be allowed. *Jones vs. State*, 506.
7. Continuance asked because defendant's brother, an important witness, had gone to Alabama, no effort being shown to get his testimony, or find his whereabouts, properly overruled. *Bush vs. State*, 658.

## CONTRACTS.

1. Breach of covenant sued on, and recovery sought on alleged agreement omitted therefrom, plaintiffs must allege such to be real contract and the omission to be by fraud, accident or mistake, and its insertion intended by one or both parties. *Porter & Mumford vs. Gorman*, 11.
2. Sale of business and good-will does not prevent seller from carrying on same occupation in same town, without express stipulation. *Ibid.*
3. Heirs-at-law cannot make a settlement with one creditor of the estate so as to limit the estate of decedent in property to be conveyed by sale under a judgment rendered in his lifetime. *Frost vs. Render*, 15.
4. Contract sued on need not be proven, unless *non est factum* pleaded. *Strange, adm'r, vs. Barrows et al., ex'r*, 23.
5. Factors who accept a draft drawn by their debtor for purchase money of a steam-engine for ginning cotton, in order to facilitate their collection from the drawer out of his cotton, are not accommodation acceptors, but original contractors. *Saulsbury, Respess & Co. vs. Blandys*, 45.
6. Compromise of a demand barred by the statute of limitations made, and a part paid cash, with parol promise to pay the

rest, such promise is not sufficient to revive the claim. *Moseley et al. vs. Jenkins, guardian*, 49.

7. Obligation of a contract made under a previous act, cannot be changed by the legislature by resolution; but such resolution may be looked to in determining the legislative intent in passing the act, where it instructs an official as to his duties under said act. *Georgia Penitentiary Company No. 2 et al. vs. Nelms et al.*, 67.
8. Suit on a note for purchase money of three mules, that plaintiff has had one of them sold under a void attachment, is not matter of recoupment. The sale, if wrongful, was a tort. The attachment arose not out of the contract, but out of defendant's breach of it. *Gerding vs. Adams*, 79.
9. Court having jurisdiction, and parties make an agreement in reference to the case, which is recorded on the minutes and approved by the judge, it binds them; more especially so, when four days elapse before a verdict, which is the subject matter of the agreement, is taken without objection, and one of the parties has received a benefit under the agreement. *Caldwell et al. vs. McWilliams*, 99.
10. Instrument, bad as a mortgage, may form part of a contract in which the note sued on was given, and follow the transfer of said note, and be admissible against the maker to show an agreement to pay counsel fees and not to plead failure of consideration. *Chapman vs. Skellie et al.*, 124.
11. Fertilizer known as "Stonewall No. 1" was imported in casks, legally analyzed and inspected, was manipulated with other ingredients, re-sacked and sold, without further analysis, as "Stonewall No. 2." A note given for such fertilizer is void, even in the hands of a *bona fide* holder for value, and without notice before maturity, because its consideration is illegal. *Johnston Bros. & Co. vs. McConnell et al.*, 129.
12. Where a town issued \$30,000.00 of bonds, and contracted with a broker to give him the use of \$7,500.00 of them, if he would keep \$7,500.00 at par as a circulating medium and redeem them when presented; when the town should redeem \$7,500.00, the other \$7,500.00 to be returned to it, and the broker became bankrupt, having on hand \$4,900.00 of the bonds; in a contest between the town and the assignees in bankruptcy for possession of them, the town should recover; The contract created a trust in the nature of a bailment, and the broker being unable to fulfil the contract, the town was

- entitled to retake the bonds. *Cabaniss et al., assignees, vs. Ponder, mayor, et al.*, 134.
13. Immaterial that the bonds in dispute are not the identical ones delivered to the bankrupt by the town. The contract contemplated a use of entire issue and a return in kind. *Ibid.*
  14. If the broker, knowing that the town had issued more than the amount of bonds agreed on, received his part and went on with the contract, he could not afterwards complain. *Ibid.*
  15. Contract between a railroad and a telegraph company, vesting in the latter the exclusive use of the right-of-way for telegraphic purposes, is void as in restraint of trade, and tending to create monopolies and being against public policy. *Western Union Telegraph Company vs. American Union Telegraph Company*, 160.
  16. Governor or superintendent of the Western and Atlantic Railroad, whilst running said road, had no authority to convey any right-of-way along its line so as to give any company exclusive rights. The legislature alone could do this. *Ibid.*
  17. Seller of a horse owed plaintiff for land, and by agreement the purchaser of the horse gave plaintiff his note, and he credited his debtor on the land with the amount thereof, the consideration of said note was the extinguishment of the debt for land, not purchase money of horse, so as to render it subject to a judgment after it had been set apart as exempt by law. *Washington vs. Cartwright*, 177.
  18. It is no defense to a suit on notes for purchase money of land that the plaintiff who sold same bought it at his own administrator's sale; that defendant knew that fact, but not its legal effect when he bought, nor that his vendor had not paid for the land or settled with the heirs, nor that he is insolvent; that defendant has paid part and will pay rest of purchase money if heirs will confirm sale, or he will give up land; it not appearing that administrator's securities are insolvent, or that defendant has been, or ever will be, disturbed in his enjoyment of land. *Hancock vs. Cloud*, 207.
  19. Written contract may be varied by proof of custom in relation to its subject matter, so universal as to warrant conclusion that it became by implication a part of the contract. *Branch, Sons & Co. vs. Palmer*, 210.
  20. Where contract was for six hundred bales of cotton, to be delivered in lots at different times, and vendor had right to draw for amount due on first lot when shipped, if draft was not paid, he was not bound to complete the contract. *Ibid.*

21. Sale of cotton for future delivery, both parties knowing that vendor expected to purchase to fulfil same, and put no skill, labor or expense therein, and none entering into the consideration, but that it was a speculation on chances, is illegal; but if cotton was to be bought and delivered at once, and skill, labor or expense entered into the contract, it is valid. *Ibid.*
22. Whilst parol proof is inadmissible to take from, add to or vary a written contract, yet in suit claiming that the writing does not contain the contract made, and praying its reformation, or if it should appear that no contract was made, then the refunding of money paid by plaintiff under mistake as to the existence of a subsisting contract, parol and written testimony admissible to show what contract there was. *Cotton States Life Insurance Company vs. Carter*, 228.
23. Note for \$172.00, with twelve per cent. interest, given in 1876, for a loan of \$150.00, is usurious and works a forfeiture under act of 1875. *Lanier vs. Cox et al.*, 265.
24. Where a note against one individually is sued in the short form, declaration cannot be amended by alleging same to be given by executrix for money used for benefit of estate, under a provision in the will directing it to be kept together, especially when amendment was barred. *Lynch, administrator, vs. Kirby, administrator*, 279.
25. Holder of collaterals bound to use reasonable diligence in connection therewith. *Colquitt & Baggs vs. Stultz*, 305.
26. If collateral be notes, or like evidence of debt, diligence in collection must be shown. If stock, diligence does not require it be sold on default of debtor, and subsequent depreciation will not relieve debtor, he not having demanded sale. *Ibid.*
27. That new stock was issued on the books to creditor makes no difference, it being still held as collateral; and plea of recoupment because of creditor's failure to sell and subsequent depreciation, demurrable. *Ibid.*
28. Where testator rents, and assigns rent note, and then re-rents to same tenant, and executor collects rent under second contract and with it pays year's support etc., and tenant becomes insolvent, the estate is liable for amount so collected before payment of money entrusted to testator. *Lathrop & Co. vs. Brown, ex'r., et al.*, 312.
29. Minor cannot make legal sale to guardian. *Howard vs. Tucker et al.*, 323.

30. Minor selling to guardian, though sale illegal, yet if for valuable consideration and she retains and receives benefit of it after majority with knowledge of rights, she thereby ratifies sale and is bound. *Ibid.*
31. Employment of plaintiff and agreement to pay an assistant to him a certain amount, plaintiff to employ said assistant if defendant fails to, and no assistant is employed by either, on suit brought for it, plaintiff cannot recover the assistant's salary, but if anything, only damages for failure to employ assistant. *Jordan vs. Jordan*, 351.
32. Contract for payment by cotton and money to landlord for rent and provisions, indorsed by him "I hereby transfer, assign and indorse," made landlord an indorser for value and liable without first showing insolvency of maker. *Smith vs. Brooks*, 356.
33. Indentures of apprenticeship during minority vest master with no greater right over female apprentices than parent has, and on her reaching age of eighteen years, are not void as in restraint of marriage. *Dent vs. Cock*, 400.
34. Employee, discharged for disobedience, non-compliance with contract, incompetency, or conduct injurious to his employer's business, cannot recover for the time he did not serve, and his employer can recoup damages sustained against wages due. *Newman vs. Reagan*, 522.
35. Such conduct would authorize employee's discharge; a slight mistake working no injury, that would ordinarily be made, would be no breach of the contract. *Bona fide* discharge is a question for the jury. *Ibid.*
36. Contract between indorser and payee of a note distinct from that between payee and maker. *Freeman, executor, vs. Bigham* 580.
37. Vendor refused to sell unless purchaser would buy all, and the latter having agreed so to do, took possession of the part he desired; the vendor having begun improvements discontinued them after the trade; at the time specified, having offered to convey all as agreed on, on purchaser's failure to comply with his contract, he was entitled to have specific performance thereof decreed. *Belle Green Mining Co. vs. Tuggle*, 652.
38. Vendor's right to specific performance of such contract is not lost because he remained in possession after such failure, being ready to convey whenever contract was complied with. *Ibid.*



39. Written contract being clear and unambiguous, understanding of parties not admissible. *Ibid.*
40. Assignee of a *fi. fa.* and defendant's widow make a contract for the sale of the entire interest in the title levied on, which provides for disposition of proceeds in various events, the widow in each case to receive everything the land brought over \$600.00, the assignee agreeing if he becomes the purchaser, to sell her the land "for \$600.00 at 12 per cent. interest from date hereof, due 1st day of January 1877," time was not of the essence of the contract, and widow might redeem land after 1st January, 1877. *Harlow vs. Cleghorn, 680.*
41. Absence of proof of contract or custom concerning payment for goods sold, presumption is that they are to be paid for on delivery. *Morris vs. Root, 680.*
42. Wife's contract for goods sold to her on her own credit not binding on husband, though seller expected her to get the money from husband to pay for them. *Ibid.*
43. Ambiguity, construction solely for court. *Faw vs. Meals, 711.*
44. Obligation signed by one "agent of the Marietta Paper Mill Company," acknowledging the receipt of money which he promises to use in said company's running capital, and, further, to do certain things for its security, and binds himself for payment of interest thereon, and payment of principal and unpaid interest at maturity of debt, creates an individual liability on the part of said signer, whether or not the company is liable thereon. *Ibid.*
45. Attorney representing party in court with his knowledge and without objection, presumption is that such services were rendered with his consent and under an implied contract to pay reasonable worth of same, but it does not follow that if the attorney was employed by only one, there being more than one party on a side, and the others knew that attorney represented the whole case and his services benefited and were accepted by them, that to avoid liability they should have notified attorney that they would not be liable. *Simms, executor, vs. Floyd, 719.*
46. Loan on condition that if it is not punctually paid, lender is to have certain shares of railroad stock with coupons and interest, a turning over of the stock and receipt of dividends was not equivalent to payment. *Couch, administrator, vs. Couch, 748.*

47. Parol agreement to convey title by a second holder thereof to the original holders of a bond for title even though he takes their note for the purchase money agreed on, is without consideration and not binding. *Lanier vs. Brooker*, 761.  
See *Landlord and Tenant*, 1; *Promissory Notes*, 9.

## CORPORATIONS.

1. Ordinance levying tax on gross sales of cotton on commission by warehousemen, etc., conflicts with act of 1873 prohibiting municipal corporations in this state from levying or assessing a tax on cotton or the sales thereof, and its enforcement was properly restrained by injunction. *Mayor and Council of the City of Columbus vs. Flournoy & Epping et al.*, 231.
2. Municipal corporation is not liable for damages caused by its council's failure to perform, or improper performance of, legislative or judicial powers and duties; but only for those caused by not, or negligently, performing purely ministerial ones. *Rivers vs. City Council of Augusta*, 375.
3. Distinction as to liability for failure to pass an ordinance or its subsequent repeal or suspension, none. So, where the council forbids the running at large of cattle, and afterwards suspends ordinance, one gored by cow in the streets has no cause of action against the city. *Ibid.*
4. Payment of municipal tax on cow does not alter the case. *Ibid.*
5. Municipality is not bound for torts of police officers, especially when not acting as such. *McElroy vs. The City of Albany*, 386.
6. Payments on stock-subscriptions induced by fraudulent representations cannot be recovered, if there are creditors to an equal or larger amount on debts contracted after such subscriptions. As to such debts the funds of the corporation, including such subscriptions, constitute a trust for their payment. *Turner vs. Granmer's Life and Health Insurance Co.*, 649.
7. Depositors in bank that has failed may proceed at law to recover their debts under §3367 *et seq.* of Code, and thus enforce ultimate liability clause of charter as against stockholders; or they may seek in equity satisfaction out of the assets, and a decree against the bank for their debts in full as a basis for proceeding against stockholders. *City Bank of Macon vs. Crossland et al.*, 734.
8. Where complainants proceed under the Code, by petition or bill to obtain judgment, and the property of the bank has been

transferred, and could not be levied on and sold, they had the right to obtain a decree for their debts ; when they seek to enforce the same against the stockholders' property, their defenses are preserved as in illegality cases, and on payment of amounts claimed of them they would be subrogated to all complainants' rights to administer assets in assignee's hands. *Ibid.*

## COSTS.

1. Costs in the supreme court awarded against defendant in error, though the judgment be affirmed with directions to write off portion of verdict, plaintiff in error being constrained to bring up case to obtain the writing off of a manifestly erroneous portion. *Rockdale Paper Mills vs. Stevens*, 380.
2. Compensation of \$2.00 per day to witnesses attending out of county of residence, applies only to the superior court. *Commissioners of Floyd County vs. Black*, 384.
3. Verdict in a case *ex contractu* is for \$25.00 "and costs of suit," there being no plea of set-off, recoupment or payment pending suit, the court should tax costs as in a justice court; and order the balance to be retained out of the recovery. The verdict means legal costs. *Smith vs. Shaffer & Ham, for use, etc.*, 459.
4. Where the law provided that the fees of a county solicitor should be the same as those of the solicitor-general for like services, such fees became fixed, and a subsequent increase of the solicitor-general's fees did not increase those of the county solicitor. *Johnston, county solicitor, vs. Lovett, county judge*, 716.

See *Actions*, 3.

COUNTY MATTERS. See *Judgments*, 15, 22 ; *Pleadings*, 18.

COVENANT. See *Contracts*, 1.

## CRIMINAL LAW.

1. Preliminary examination by the judge as to the admissibility of a confession, the jury should be retired. *Hall vs. State*, 36.
2. Witnesses testify on such examination, in the presence of the jury, that defendant confessed, a new trial will be granted, although witnesses were not allowed to state the confession. *Ibid.*

3. Pistol of deceased is found in a house occupied by defendant and others, it is error for the judge to charge on the hypothesis that deceased's pistol was found in defendant's possession, without charging on the joint occupancy of house, and the equal facilities of the others to have concealed it. *Ibid.*
4. Motion for continuance in a criminal case for the absence of witness, what other witnesses will testify as to the same subject matter is not admissible on counter-showing; but what such witness will testify is proper to be inquired into, and, to that end, what he swore as to the same facts on a former trial may be shown. *Johnson vs. State, 94.*
5. Same time and place, one person is killed and another assaulted with intent to murder, an acquittal of the killing is hardly good as a plea in bar to the assault. Certainly not, when the killing and assault took place at different places. *Ibid.*
6. Jurors put upon their *voir dire* in criminal cases can be asked only the statutory questions. If further investigation is desired, they should be put upon the court as a trier. *Ibid.*
7. Statement of person assaulted though half unconsciously, on the day of the assault, so soon as found, at the moment of restoration to sensibility, is admissible as *res gesta*. *Ibid.*
8. No evidence of confessions, it is error for the court to charge that they should be received with great caution. *Jones vs. State, 147.*
9. Prisoner to be charged with his wife's admissions, acquiesced in by silence, they must be made in his immediate presence, and where he could distinctly hear everything said; otherwise, they are inadmissible. *Ibid.*
10. The indictment for murder properly designates deceased by the name by which he was generally known, though he might also have another name. The question of name is for the jury. *Ibid.*
11. Evidence presents solely the question of murder or innocence, the court need not charge concerning other grades of homicide. *Ibid.*
12. Voluntary confession of crime and its details, supported as to the fact and details by corroborating circumstances of the *corpus delicti*, will authorize conviction for murder. *Paul vs. State, 152.*
13. Evidence, though not definite, indicates defendant to be over fourteen years old, and shows capacity to distinguish between right and wrong, and also bad character and temper of prisoner, verdict of guilty will be sustained. *Ibid.*

14. If a marriage between persons of color in December, 1865, was illegal, which is by no means apparent, yet if they were living together as man and wife at the date of the act of 1866, the marriage relation was thereby established, and bigamy could be predicated thereon. *Kirk vs. State*, 159.
15. Indictment for bigamy need not state that the husband and wife are colored. *Ibid.*
16. That certain witnesses heard another person, not the defendant, say he committed the offense, is inadmissible on the trial of criminal case. *Daniel vs. State*, 199.
17. Homicide a misdemeanor or felony, a question for the jury under the charge of the court. *The Western and Atlantic Railroad vs. Sawtell*, 235.
18. Homicide resulting from collision of trains is *prima facie* felonious. *Ibid.*
19. Fine of \$200.00, or twelve months in the chain-gang, is not excessive, upon conviction for carrying concealed weapons. *Shelton vs. State*, 303.
20. Venue, in criminal cases, must be proved beyond reasonable doubt. *Rooks vs. State*, 330.
21. Recognizance was conditioned that the principal appear at specified term of court, and there was nothing as to further appearance: appearance at specified term discharged the bond and relieved securities from liability for non-appearance of principal at subsequent term. *Colquitt, governor, vs. Smith et al.*, 341.
22. General but not inflexible rule is, that where witness is out of jurisdiction a continuance will be refused; but where witness has promised, and is reasonably expected to attend in reasonable time, his testimony is material and diligence is shown, a continuance or postponement should be allowed. *Brown vs. State*, 332.
23. Horse stolen, and shortly thereafter defendant sold it some miles away, making false statement as to ownership and possession, will support verdict of guilty of larceny. *Duckett vs. State*, 369.
24. Compensation of \$2.00 per day to witnesses attending out of county of residence applies only to the superior court. *Commissioners of Floyd County vs. Black*, 384.
25. Indictment charging offense as committed in a certain year, without naming day or month, should be quashed on special demurrer. *Bailey vs. State*, 410.

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26. Shooting of a cow is not a criminal offense, but only the killing or maiming of cattle, or killing of a hog. *Ibid.*
  27. Verdict not contrary to evidence, a new trial will be refused, although the solicitor-general stated that he thought the grant of one would advance the ends of justice. *Stodghill vs. State, 422.*
  28. If defendant sought deceased for purpose of reconciliation, and was compelled to kill him to save his own life, by necessity, not brought on by himself, he should be acquitted; but if the object of the meeting was to kill, or mutual combat with deadly weapons, offense of murder or manslaughter, according to deliberation or excitement characterizing conduct. *Roberts vs. State, 430.*
  29. No menace, threat, contemptuous gesture, or presentation of weapons without a manifest intention to use them presently, will justify the killing. *Ibid.*
  30. For a slayer to be justified, he must have acted without malice, and not in a spirit of revenge, the deceased having been the assailant, in order to save his own life, or under pressure of equivalent circumstances; a bare fear or apprehension is insufficient, the danger must be urgent. *Ibid.*
  31. General rule is that distinct offenses cannot be charged in same indictment, but those of same nature, differing only in degree, may be so joined, and some offenses not of same nature, but constituting one transaction, as a larceny and burglary occurring together, can be so joined; even then the allegation is more to fix the burglary than to charge the larceny. *Gilbert vs. State, 449.*
  32. Declarations by deceased as to who shot him, made immediately after he was shot and had fled to the nearest house, and shortly before he became unconscious, though made some hours before death, are admissible as dying declarations. *Dumas vs. State, 472.*
  33. Juror not understanding statutory questions asked on *voir dire*, the court may explain them, and if he then answer differently, qualifying himself, it is no ground for new trial. *Ibid.*
  34. Talesmen summoned cannot be struck for cause because they formed part of an array of jurors to which a challenge had been sustained in same case. If the second panel was illegally summoned, the array should have been again challenged. *Ibid.*

35. Counsel appointed by the court to defend, after the case is called on a trial for murder, counsel previously representing defendant then announcing that he no longer did so, and counsel so appointed state in their place that they cannot, by reason of the shortness of time, do justice to the prisoner, the evidence being circumstantial, a postponement to a later day should be allowed. *Jones vs. State*, 506.
36. Confessions must be adjudged by the court to be voluntary; they then go to the jury only *prima facie* as having been so made. *Ibid.*
37. Preliminary examination as to its admissibility in the presence of the jury works no harm to the defendant where the confession is admitted; otherwise where it is excluded. *Ibid.*
38. Statement of prisoner, charge that the jury might give just such force as they thought right, believing all, part, or none of it, just as they did the testimony of a witness, substantially complies with the act of 1878-9, providing that the jury may believe the statement in preference to the testimony. *Ibid.*
39. Error for the court to read to the jury from a volume of supreme court reports, that "juries are generally too reluctant to convict on circumstantial evidence." *Ibid.*
40. Written charge may be required in felony cases; when delivered it becomes an office paper, to be filed, and is accessible to all persons interested. *Ibid.*
41. Demand for trial, to entitle a defendant to a discharge under, one jury qualified to try him must be empaneled when it is made, and another at the next term. This is sufficient, even though such second jury is discharged after inquiry by the court if any member of the bar knows of further use for them, and prisoner's counsel makes no response. *Adams vs. State*, 516.
42. Prosecutrix cannot be asked as to statements made to an attorney in contemplation of his employment in the case. If she voluntarily, however, testify as to a part of her conversation with him on direct examination, the other side may inquire concerning the entire conversation. If she refuse to answer as to any part, as tending to criminate her, the whole should be excluded. *Young vs. State*, 525.
43. Part of a house used for tipling purposes, it must be completely closed on the Sabbath, and therefore keeping open a way between the other part of the house used as a bedroom and the saloon for ingress or egress to or from the bed-

room on the Sabbath, would be a violation of the statute.  
*Harvey vs. State, 568.*

44. Charge that certain point is conceded, when it really is, and is immaterial, no ground for new trial. *Jones vs. State, 621.*
45. Charge put in argumentative or interrogative way, but not so as to injure defendant, while not best, not ground for new trial. *Ibid.*
46. Indictment charging two modes of killing, evidence sufficient if proving either or both. *Ibid.*
47. Jury are no more judges of the law and facts in a case of circumstantial evidence than in any other criminal case. *Ibid.*
48. Felony, continuance asked because defendant's brother, an important witness, had gone to Alabama, no effort to secure his testimony or find out his whereabouts shown, properly overruled. *Bush vs. State, 658.*
50. Burglary, reasonable doubt to acquit prisoner is whether or not he committed that offense, and not whether he is guilty of larceny from the house. *Ibid.*
51. Charge in a murder case not amplified as counsel desires, on a given point, no request being made for a charge on such point, and the charge given containing substantially what counsel desired, no ground for new trial. *Powell vs. State, 707.*
52. Counsel may read and comment on the law to a jury in a criminal case. During argument he may ask the court's opinion on any principle involved, and court may rule upon it in his charge or at the time. *Ibid.*
53. Indictment states that the grand jury were "sworn, chosen and selected," no ground for quashing. *Wesley vs. State, 731.*
54. Juror appears competent when put on *voir dire* and is sworn in chief, still he can be proved incompetent and rejected. *Ibid.*
55. Rape, carnal knowledge must be shown by direct or circumstantial evidence. *Ibid.*
56. Venue of crime must be proved beyond reasonable doubt. *Moye vs. State, 754.*
57. Larceny from the person, it must appear that some article of value was wrongfully and fraudulently taken from the person of another, privately and without his knowledge, with intent to steal the same. The crime is not complete if the owner knew that the property was being taken. *Ibid.*



58. *Alibi* involves the impossibility of the prisoner's presence at the time and place of offense. The range of evidence in respect to time and place must reasonably exclude the possibility of such presence. *Wade vs. State*, 756.
59. It may be error for the court to tell the jury in a criminal case that the law as read to them by counsel was the law of Georgia; but this court cannot grant a new trial on that ground when it does not appear what was so read, especially when both sides admit that the killing was murder, and the sole question was, did the defendant do it. *Ibid.*
60. Track, testimony as to the measurement of, admissible without producing the measure itself in open court. *Ibid.*
61. Conversation between the deceased and another, in relation to a difficulty he had with a third party, not prisoner, in which violent language had been used, not competent testimony. *Ibid.*
62. Principal witness and prisoner inimical, and witness testified under feelings of malice, and defendant's counsel did not know of this until after trial, not ground for new trial. *Beckus. State*, 766.

CROPS. See *Levy and Sale*, 12.

CUSTOM. See *Evidence*, 24, 25.

#### DAMAGES.

1. Minor children, by section 2791 of the Code, may recover for the homicide of the mother as well as of the father. *Atlanta & West Point Railroad vs. Venable, next friend*, 55.
2. Damages claimed for the sale of one of three mules under a void attachment sued out by the vendor, cannot be recouped in a suit by him on a note given for their purchase money. The sale if wrongful was a tort. The attachment arose not out of the contract sued on but out of defendant's breach thereof. *Gerding vs. Adams*, 79.
3. Railroad, action against for damages to personalty in charge of plaintiff's agent; if the agent's fault occasion the injury entirely, plaintiff cannot recover; if both the agent's and the company's fault contribute, plaintiff can recover, the amount to be diminished in proportion to the agent's fault. If the damage result wholly from the company's agents, plaintiff can recover full damages. *Atlanta & West Point Railroad vs. Wyly*, 120.

4. Sheriffs failing to properly execute and return final process are liable to plaintiffs in *fi. fa.* in an action on the case or by rule, for the actual injury sustained. *Wakefield vs. Moore, sheriff, et al.*, 268.
5. Ordinance, there is no distinction as to liability for failure to pass, and its subsequent repeal or suspension. So where the council forbid running of cattle at large and afterwards suspend ordinance, one gored by a cow in the streets has no cause of action against the city. *Rivers vs. City Council of Augusta*, 376.
6. Owner pays municipal tax on cow does not alter the case. *Ibid.*
7. Estray taken up by ordinary's advice by one who substantially carries out the law as to appraisement, etc., and holds the estray in readiness to meet the owner's demand, he is not liable in quintuple damages. Subsequent irregularities of the officers would not affect him. *Houser vs. Scott*, 425.
8. Conduct of taker up of an estray in perfect good faith, he is not liable because return was made on the sixth day after appraisement, nor because one appraiser was only a freeholder to the extent of his interest in a homestead estate. *Ibid.*
9. Witnesses differ as to the value of the property injured, their testimony should be weighed by the test of honesty, disinterestedness, opportunity for knowledge and intelligence, before attempting to reach a result by averaging the value sworn to. *Harvey vs. Boswell*, 550.
10. Disregard by railroad of the requirements of the law as to crossings, may be considered by the jury in determining whether or not an accident occurring just beyond crossing was occasioned by negligence of railroad employee. *Western & Atlantic Railroad vs. Jones*, 631.

See *Railroads*, 2, 12.

## DEBTOR AND CREDITOR.

1. Arrangement between heirs-at-law and one creditor of estate is ineffectual to limit the decedent's estate in property to be conveyed by sale under judgment rendered in his lifetime. *Frost vs. Render*, 15.
2. Money secured by the deed having been borrowed to buy the land conveyed, abundant equity in bill to enforce payment out of land. The debtor cannot retain both the land and money. *Bateman et ux. vs. Archer*, 271.

3. Neither vendor nor his privies can defeat ejectment brought by vendee for value, by setting up that deed was made to defraud creditors—deed is good as to them though void as to creditors. *Bush vs. Rogan*, 320.
4. Vendor, declarations before or after making of deed as to the object of its execution and his embarrassed condition, inadmissible. *Ibid.*

#### DECREE.

1. Motion, decree cannot be set aside on, but objection to remedy can be waived. *Coston vs. Dudley, executor, et al.*, 252.
2. Motion argued and granted, objection to it as remedy is thereby waived. *Ibid.*
3. Decree *pro confesso* cannot be entered, unless complainant, or his counsel in his absence, swears that the facts charged are true, or that he is informed and believes that defendant would admit the same in an honest answer. *Ibid.*
4. Decree against one of two defendants for money, and that certain mortgages held by the other against complainant be as to him satisfied, and the defendant against whom money decree is had moves for and obtains a new trial, the other defendant not joining in or filing motion; the grant of new trial as to one did not affect the decree as to the other defendant, and said mortgages will not take funds arising from property which they covered as against a junior judgment. *Willingham vs. Field*, 440.

See *Equity*, 15, 16, 17; *Judgments*, 12.

#### DEEDS.

1. Partnership by name, deed made to, the partners hold as tenants in common. *Printup Bros. & Co. vs. Turner*, 71.
2. Deed or mortgage to land, made in partnership name, to secure a note made and signed in the partnership name, but signed by the members individually, is a conveyance both from the partnership and its members individually, and may be enforced against one or all of them. *Ibid.*
3. Deed or mortgage to partnership lands, made by one partner in the partnership name and to secure a partnership debt, unless authorized or subsequently ratified by his copartners, does not convey the partnership property; it conveys only his own interest, and can be, if a mortgage, foreclosed only as to it. *Ibid.*

4. Four-sevenths of land conveyed in trust to one party, and three-sevenths not in trust to another, it is error to instruct jury that they may find all was trust property, regardless of the deed. *Hathorn et al. vs. Maynard*, 168.
5. Intention of grantor in making, deed best evidence of; unless inaccessible, parol evidence on that subject should be excluded. *Ibid.*
6. Neither vendor nor his privies can defeat ejectment brought by vendee for value by setting up that deed was made to defraud creditors; deed is good as to them, though void as to creditors. *Bush vs. Rogers*, 320.
7. Vendee's declarations, before or after making of deed, as to the object of its execution and his embarrassed condition, inadmissible. *Ibid.*
8. Recitals in tax deed are *prima facie* evidence of the acts of officer making sale, but not of his authority to sell. *Shackelford vs. Hooper et al.*, 366.
9. Deeds between several lessors in ejectment are admissible to show privity between them, and plaintiff's right to use their names. *Gunn vs. Wades*, 537.
10. Conveyance of homestead set apart under the constitution of 1868 is not void under article 9, section 8, paragraph 1, of constitution of 1877. *Ibid.*
11. Conveyance of homestead to secure a debt superior to it passes title. *Ibid.*
12. Deed tendered by plaintiff in ejectment, though conveying no title, should be admitted, the court construing its legal effect. *Ibid.*

See *Equity*, 4.

DISCOVERY. See *Equity*, 33.

DISTRESS WARRANT.

1. Counter-affidavit to a distress warrant is pleading so far as to permit its amendment by adding a plea of bankruptcy, if it operates to discharge debt. The ruling in 53 Ga., 56, will not be extended. *Rountree et al. vs. Rutherford, administrator*, 444.
2. *Mesne* process, distress warrant becomes on filing of counter-affidavit with bond, and the debt is discharged by bankruptcy. *Ibid.*



3. Bankruptcy of the principal of bond for eventual condemnation money in a distress warrant case, discharges both principal and surety if pleaded. *Ibid.*
4. Specifics, distress warrant lies for rent payable in ; if their value is fluctuating, it must be proved on trial ; statement in warrant of the amount and supposed value of specific due is sufficient. *Tucker vs. Cox, 700.*
5. Demand for payment is a condition precedent to enforcement of landlord's special lien on crops, but not of his general lien on his tenant's property by distress warrant. *McCray vs. Samuel, 739.*
6. Justice courts are to be held at fixed times and places under constitution of 1877. Distress warrant made returnable to the next term of justice court, without specifying day on which it is held, sufficient. *Ibid.*
7. Landlord having two liquidated demands for rent due for consecutive years, may or may not, at option, include them in one distress warrant, *Ibid.*

DISTRIBUTION. See *Administrators and Executors, 9.*

### EJECTMENT.

1. Plaintiff in ejectment or complaint for land must show title in himself ; he cannot rely on weakness of defendant's title. *Nix vs. Collins, 219.*
2. Complaint for land, plaintiff cannot rely on estoppel to prevent defendant from disputing his title. If he seeks to recover on equitable title, he should set it up by equitable pleadings. *Ibid.*
3. Constructive possession under Code, section 2681, actual possession of a part of the tract is necessary, whatever may have been the prior law. *Anderson vs. Dodd, 402.*
4. Maker of absolute deed to secure debt cannot defeat ejectment brought thereon by plea of partial payment. He must tender balance and allege other reasons why to eject him would be unreasonable, and pray proper relief. *Robinson et al. vs. Alexander et ux., 406.*
5. Deeds passed between several lessors in ejectment, whether void, or voidable, are admissible to show privity between them, and to establish plaintiff's right to use their names. *Gunn vs. Wades, 537.*

6. Deed tendered by plaintiff in ejectment void, it should nevertheless be admitted, subject to the court's construction as to its legal effect. *Ibid.*
7. Recovery in ejectment, on a declaration with several demises, will be upheld if only one demise be good. *Ibid.*
8. Recovery in ejectment can be had on the demise of homestead beneficiaries, in a suit pending at the date of the act of 1876, brought on the demises of said beneficiaries and purchasers from them; for if the conveyance of the homestead was void, the title remained in the beneficiaries. *Ibid.*

#### ELECTION.

1. Justice of the peace, not a candidate at the same election, must be one of the managers of a constable's election. Such officer acting only a part of day, renders election illegal. *Franklin vs. Kaufman et al.*, 260.
2. Failure to elect a constable, or if the elect fails to qualify, there is a vacancy, and the magistrate should appoint. A new election is unauthorized. *Ibid.*

EMBLEMENTS. See *Landlord and Tenant*, 2.

#### EMINENT DOMAIN.

1. Railroad companies possess their rights-of-way by the exercise of the right of eminent domain, granted by the state for specified uses. Property so condemned to the public use cannot be conveyed to another company for its exclusive interest and in antagonism to the public interest. *Western Union Telegraph Co. vs. American Union Telegraph Co.*, 160.

See *Railroads*, 7.

#### EQUITY.

1. Legal defense, party having, must plead the same or he will be concluded and equity will not relieve, unless failure to plead was caused by fraud of opposite party, or accident without fault in himself. But equitable defense requiring the making of new parties, is not cut off by judgment at law; it may be asserted by bill in equity after judgment. *Waters et al. vs. Perkins*, 32.
2. Demurrer to a bill in equity, it and its exhibits alone looked to. *Ibid.*

3. Demurrer should be filed and decided at the first term ; but if an amendment is made, then a demurrer can be filed to the new case it presents. *Barnett et al. vs. People's Bank of Newnan*, 51.
4. Reform a deed made to secure a debt into a mortgage, equity cannot on the ground that the maker so understood and intended it, since the act of December 12th, 1871. *Ibid*.
5. Specific performance of a contract of sale by a trustee under power of sale on the written consent of the beneficiary, will not be decreed, though verbal consent be shown. *Berrien, trustee, et al. vs. Thomas*, 61.
6. Purchaser with notice, of property bought by executor at his own sale, is liable only to the extent of what he purchased, and not to the same extent as the executor. *Willis et al. vs. Foster, trustee*, 82.
7. Mistake relieved against with caution, and to justify relief the evidence must be clear, unequivocal and decisive as to the mistake. It must arise from ignorance, surprise, imposition or misplaced confidence, and be unmixed with negligence. The present does not make such a case. *Iverson, adm'r, vs. Wilburn, adm'r*, 103.
8. Writ of error lies immediately to the grant or refusal of an injunction, yet this speedy remedy does not lie to bill dismissed on demurrer, either at chambers or in term. *Sheibly et al. vs. The Georgia Southern R. R. Co.*, 107.
9. Motion filed to set aside verdict, and also bill covering all issues made by the motion, seeking the same object, it is not error to refuse to try motion separately first ; equity having taken possession will retain the same, and make a final decree covering all issues raised by the bill and answer in nature of cross-bill. *McWilliams vs. Walthal et al., ex'rs*, 109.
10. Decree binding all property, without reference to sale of particular property and distribution of the proceeds, has the same force as regards interest as a judgment when contesting for money. *National Bank of Augusta vs. Heard*, 189.
11. Provision for sale of certain property and division of proceeds according to certain fixed priorities, naming amounts to be paid to claimants, and there is not enough to pay principal and interest, interest will not be given to one to exclusion of others. Net increase of property from which fund arose, in a receiver's hands, would be divided proportionally. *Ibid*.

12. Alimony is granted in pending divorce suits and suits where there is a voluntary separation, and where husband abandons wife. In these latter cases equity may by decree compel husband to make provision for support of wife and children, *Gray Bros. et al. vs. Gray*, 193.
13. Married woman, by her husband as trustee, held stock in a corporation, and her trustee transferred it to a non-resident to pay his own debt, and such non-resident to another, and their attorney who holds the certificate had notified the corporation not to pay the dividends, although the certificate (which also contained the power to transfer stock on the books) showed the trust; a bill filed to enjoin payment of dividends to the attorney, to remove said trustee, to have delivered to her said certificate and a new one issued, against said trustee, non-residents, attorney and corporation, is not demurrable for want of equity or misjoinder of the attorney with the corporation. *Moses vs. Watson*, 196.
14. One of two non-residents dies, and no representative of his estate is made a party, and the other was not served, but their resident attorney, in possession of stock certificates in suit, had been served, there is no error in letting case proceed to final decree. *Ibid.*
15. Decree cannot be set aside on motion, but objection to remedy can be waived. *Coston vs. Dudley, executor, et al.*, 252.
16. Motion argued and granted, objection to remedy thereby waived. *Ibid.*
17. Decree *pro confesso* cannot be entered unless complainant, or his counsel in his absence, swears that the facts charged are true, or that he is informed or believes that defendant would admit same in an honest answer. *Ibid.*
18. Absolute deed made to land by debtor to creditor with separate written agreement from latter to relinquish all claim thereto, if paid a certain sum by a specified time, which agreement, debtor not paying, is canceled and renewed from year to year, a bill in equity by creditor recognizing transaction as an equitable mortgage, praying final foreclosure of defendant's equity of redemption on his failure to pay amount due, is not demurrable on ground of common law remedy. The transaction does not make a mortgage enforceable at law. *Bateman et ux. vs. Archer*, 271.
19. Money secured by the deed having been borrowed to buy the land conveyed, abundant equity in bill to enforce payment



- out of land. The debtor cannot retain both the land and money. *Ibid.*
20. Wife filed bill in Crawford superior court against her husband, living in Crawford county, and her guardian, living in Upson county, praying relief only against guardian, said court has no jurisdiction. *Davis vs. McMichael et al.*, 395.
21. Maker of absolute deed to secure debt cannot defeat ejectment brought thereon by plea of partial payment. He must tender balance and allege other reasons why to eject him would be unreasonable, and pray proper relief. *Robinson et al. vs. Alexander et ux.*, 406.
22. Equitable claims of *fi. fas* equal, the oldest will take the fund. *Allen vs. Sharp, guardian*, 417.
23. Purchaser of property condemned to sale for a particular debt by a common law court, but carried by the parties into equity, and sold by decree instead of under the common law judgment, buying *pendente lite*, is as much affected by that sale as if it had been made under said judgment. *Smith vs. Coker*, 461.
24. Decrees moulded so as to meet the exigencies of each case. *Ibid.*
25. Sale by a commissioner in equity does or does not require confirmation accordingly as made under interlocutory or final decree. *Ibid.*
26. Head of family should bring suit to recover homestead in the absence of reason shown to the contrary, and a bill filed by the beneficiaries of the homestead, no reason being shown why the head of the family did not sue, was demurrable. *Shattles, guardian, vs. Melton*, 464.
27. Suit brought in July, 1876, by beneficiaries of homestead sold in 1873, to recover it, too late in 1880 to amend by making head of family a party complainant. *Ibid.*
28. Proof need not be *conclusive*, and to so charge is error; especially where the answer is not sworn to and discovery is waived. *DeLaigle vs. Denham*, 482.
29. Executrix contracted an account for plantation and family supplies, money, etc., and gave her note as executrix therefor, intermarries and dies, and the legatees agree with her husband, the administrator *de bonis non*, to settle a bill for account against him by a decree turning over the estate to them, they paying the debts, and the estate, mainly land, is about to be turned over without paying debts, there being no

- provision in the will charging the land for such a debt, and it not being shown that executrix or her estate was insolvent, or that said account went to permanently benefit testator's estate, there is no equity in a bill praying injunction to prevent said settlement, and that debt be paid out of estate in hand. *Deas, administrator, vs. McRae, administrator, et al.*, 531.
30. Creditor seeking to collect a debt even in judgment must show some special circumstances to authorize equitable interference. Void transfer of property, or void homestead, etc., are not sufficient. *Bessman et al. vs. Cronan et ux.*, 559.
31. Action at law will not be restrained where defenses can be fully set up therein; it must appear that remedy at law is not complete. The concurrent jurisdiction of law and equity has been enlarged, and the court first taking will retain, except on good cause shown. *Northeastern Railroad Co. vs. Barrett et al., executors*, 601.
32. Code providing that matters heretofore requiring supplemental bills may be set up by amendment, amendment to a bill against bank to reach equitable assets, by a creditor with *fi. fa.* returned unsatisfied, requiring the president to account for assets in his hands to pay the debt, was proper. *Merchants & Planter's National Bank et al. vs. Trustees of the Masonic Hall*, 603.
33. National bank going into voluntary liquidation, is subject to the same proceedings in equity as state banks, and equity can reach and appropriate assets in the hands of its president to pay a debt, at a creditor's instance. *Ibid.*
34. Discovery may be waived by amendment before answer. *Ibid.*
35. Bill alleging that a judgment on a writ *ad quod damnum* had been made in complainant's favor against a railroad company for property condemned as a right-of-way, the title thereto to vest in said company on payment of the sum assessed, but establishing no special lien thereon; that, pending these proceedings, said railroad being insolvent, was sold under decree to defendant, who was using said property, as part of its right-of-way, and praying injunction of such use until payment of sum assessed and for general relief, is not demurrable. Common law furnishes no remedy. *Gammage vs. Georgia Southern Railroad Company*, 614.
36. Complainant being in *laches*, refusal of temporary injunction not interfered with, but chancellor directed to submit to jury on trial, whether defendant be not enjoined if judgment not paid by a fixed time. *Ibid.*

37. Relief pertinent to the case made by the bill only can be granted under the prayer for general relief; therefore the title to premises will not be determined on a bill to enjoin a trespass. *Peek vs. Wright, adm'r, 638.*
38. Bill in equity not dismissed because remedy at law complete, when motion is made at trial term. *Belle Greene Mining Company vs. Tuggle, 652; Iverson, trustee, et al. vs. Sawlsbury, trustee, et al., 724.*
39. Contract whereby one agreed to purchase lands and take title at a certain time, and actually went into possession and made use of a part, and complainant had suspended improvements begun on the faith of such trade, and defendant fails to comply with his contract, praying specific performance, there is equity in such bill, and none the less so because complainant has remained in possession after such failure, he being ready to perform his part of contract at all times. *Ibid.*
40. Judgment at law, on the draft itself, in favor of one surety against another—the issue being, was he a co-surety and liable for contribution at all—will not bar a bill in equity to enjoin such judgment, filed by such co-surety as such, involving new issues and parties. *Simmons vs. Camp, 673.*
41. Concealment of material facts itself amounts to fraud when one party has a right to expect full communication from the other, or where one knows that the other is laboring under a delusion with respect to the property sold or the conditions of the other party and keeps silent. *Harlow vs. Clegborn, 680.*
42. Conflicting claims as to intestate's estate, the same is insolvent, debts are of doubtful priority, some have been paid by administrator, he supposing the estate to be solvent, homestead has been set apart in all the realty, a year's support has been allowed, some perishable property has been sold, some accounts have been or can be collected and others cannot, one debt has been reduced to judgment and *fi. fa.* levied on said realty, and other suits and complications will follow, a bill to marshal assets, enjoin creditors, and for directions as to administration, is not demurrable. *Johnson, adm'r, vs. Flanders et al., 691.*
43. Minor beneficiary of trust property illegally sold, after attaining majority, repudiated the sale and brought ejectment for the lot, a bill to enjoin the same, claiming compensation

for improvements innocently placed thereon by purchaser, would not be without equity. *Iverson, trustee, et al. vs. Saulsbury, trustee, et al.*, 724.

44. Questions read in hearing of opposing counsel, the latter should state specifically, and not generally, that he objects to them, and where he agreed to state specific objections in argument, but failed to do so, objection will not be considered. *Ibid.*
45. Chancellor at chambers has jurisdiction to order sale of part of trust estate to pay a debt which was an incumbrance on whole estate, *cestui que trust* assenting, and all parties having notice and being represented. *Ibid.*
46. Depositors in bank that has failed may proceed at law to recover their debts under §3367 *et seq.* of Code, and thus enforce ultimate liability clause of charter as against stockholders, or they may seek in equity satisfaction out of the assets, and a decree against the bank for their debts in full as a basis for proceeding against stockholders. *City Bank of Macon vs. Crossland et al.*, 734.
47. Bill fails for want of evidence to accomplish all of its purposes, such as the appointment of a receiver, or annulling of assignment, court of equity still has jurisdiction to make proper decree in case, as, for instance, the amount of complainants' debts against bank. *Ibid.*
48. Complainants could have proceeded by petition or bill to obtain judgments, and as all the property of the bank has been transferred and could not be levied on and sold, creditors had the right to obtain a decree for their debts; when they seek to enforce the same against the stockholders' property, their defenses are preserved as in illegality cases, and on payment of amounts claimed of them, they would be subrogated to all complainants' rights to administer assets in assignee's hands. *Ibid.*
49. Decree in favor of bank's creditors not before the court, properly refused. The assignee may appropriate the assets to their debts under the assignment without decree. *Ibid.*
50. Receipt of part payment of debt, and ratification thereby of assignment, did not impair complainants' right to proceed at law, or in equity, against the assets of the bank or the stockholders on such reduced claim. *Ibid.*
51. Jurisdiction to settle a trust estate, equity has; that a court of law has concurrent jurisdiction, will not oust that of equity, especially where fraud is charged. *Park vs. Park*, 746.

52. Will provides that the executor should keep money and property bequeathed to a minor to be paid to her at majority, free from liability to account for hire or interest, a bill by the legatee, after she came of age, for account and settlement, charging fraudulent use of the funds by executor, was not demurrable for want of equity. *Ibid.*

#### ESTATE.

1. Life-estate in money, with remainder over, may be created. Money may be lost, but should not be destroyed in the use. *Phillips, adm'x, vs. Crews et al., 274.*
2. Testator died in 1820, leaving by will a life-estate to trustees for his married daughter, the trust to cease and property to vest in her should she survive her husband; if she dies childless, then in remainder over; land granted to testator's heirs and representatives, after his death, does not pass under the will, but by the grant; and where the trustees, with her consent, conveyed railroad stock received for *cestui que trust's* share in said land, and she being childless and a widow, afterwards releases all of her claim thereto to the remaindermen, and they, in 1856, sue for said stock, and are defeated, and after such widow's death, testator's grandchildren and representatives file a bill to recover said stock, they have no interest therein; said conveyance from the trustees gave a valid title. *Ware et al. vs. Trustees of Emory College et al., 328.*  
*See Contracts, 3.*

#### ESTOPPEL.

1. Complaint for land, plaintiff cannot rely on estoppel to prevent defendant from disputing his title, if he seeks to recover on equitable title he should set it up by equitable pleadings. *Nix vs. Collins, 219.*
2. Principle that one who, by acts or omissions, induces another without fault, to change his condition, is estopped, applies to all sales, void, voidable or valid. *Osborn vs. Elder, 360.*
3. Beneficiaries of trust property illegally sold, who for years have seen the purchasers erecting valuable improvements thereon without objection, are estopped from setting up title thereto. *Iverson, trustee, et al. vs. Saulsbury, trustee, et al., 724.*
4. Would a minor old enough to understand his rights be estopped by like conduct? *Ibid.*

ESTRAYS. *See Damages, 7, 8.*

## EVIDENCE.

1. Instrument sued on may be introduced in evidence without proof of execution, in the absence of a plea of *non est factum*. *Strange, adm'r, vs. Barrow et al., ex'rs, 23.*
2. Statement of person assaulted, though half unconscious, on the day of the assault, as soon as found, at the moment of restoration to sensibility, is admissible as *res gestæ*. *Johnson vs. State, 94.*
3. Statements of counsel made in their place, need not be verified unless required by the opposite side. *Caldwell et al. vs. McWilliams, 99.*
4. Parol evidence is admissible to show what testimony was submitted without objection on the trial of a case, the validity and propriety of the verdict therein, as applicable to the pleadings, being in issue. *McWilliams vs. Walthall et al., ex'rs, 109.*
5. Written instrument, bad as a mortgage, may still form part of the contract in which the note sued on was given, follow the transfer of said note, and be admissible against the maker to show his agreement to pay counsel fees, and not to plead failure of consideration. *Chapman vs. Skellie et al., 124.*
6. Proceeding to reform deed brought by daughter against vendor and her husband's administrator, it appeared that complainant's father paid purchase money, and the deed was made to the son-in-law, and the question was whether it should have been made to him as trustee for his wife, his death did not prevent the father from testifying as to the instructions he gave deceased in regard to the manner of taking title while latter was acting as his agent for that purpose. *Davis, adm'r, et al. vs. McLester, 132.*
7. Witness, bare conclusion as to an agreement should be excluded, yet after stating the facts of the transaction he may give his understanding as he heard it from the parties. *Phillips vs. Lindsey, 139.*
8. Examination preliminary to allowing the introduction of secondary evidence is largely left to the presiding judge, and where he admits the secondary evidence, discretion must clearly be abused to warrant interference. *Ibid.*
9. Wife is a competent witness to prove that she paid a note for her husband, in a suit thereon against him, though payee is dead. *Rush, adm'r, vs. Ross, adm'r, 144.*

10. Case closed and court adjourns until morning, and when it meets plaintiff's counsel propose to contradict the testimony of one of the defendant's witnesses examined the day before, by reading her answers to interrogatories, and it is not shown that she is then in court, or that the proper foundation for impeachment has been laid, the discretion of the court refusing to allow such answers read will not be interfered with. *Ibid.*
11. Prisoner to be charged with his wife's admissions, acquiesced in by silence, such sayings must have been made in his immediate presence, and where he could distinctly hear everything; otherwise they will be inadmissible. *Jones vs. State, 147.*
12. Voluntary confession of a crime and its details, is sufficiently supported if corroborated by circumstances of the *corpus delicti*, to authorize a conviction. *Paul vs. State, 152.*
13. Levy describing house and lot as situate in a certain town, as owned by one man and there lived in by another, and having been known and attached as the property of a third, is sufficiently definite to prevent *fi. fa.* being rejected for uncertainty of description. *Longworthy vs. Featherston, 165.*
14. Vendee from vendor with apparently absolute title, protected from a trust sought to be set up, if he shows that he had no notice that trust funds went into property; that he had knowledge that vendor had mingled trust funds with his own, insufficient. *Onus of identifying trust property is not on purchaser, if innocent. Hathorn et al. vs. Maynard, 168.*
15. Deed conveys four-sevenths of land in trust to one party, and three-sevenths not in trust to another, it is error to instruct jury that they may find all was trust property, regardless of the deed. *Ibid.*
16. Trustee who mingled his own with trust funds may settle with *cestuis que trust* by conveying to them property in equal value to the *corpus* of the estate and the profits. If they are in possession of such property, claiming and enjoying it, it is evidence of their acceptance of settlement. *Ibid.*
17. Deed is best evidence of grantor's intention in making it, unless inaccessible parol evidence on that subject should be excluded. *Ibid.*
18. Witnesses heard another person, not the defendant, say he committed the offense, inadmissible on the trial of criminal case. *Daniel vs. State, 199.*

19. Levy "on nine hundred acres of land, as the property of James B. Hart, one of the defendants, said property being situated and in the vicinity of Union Point, Greene county, Georgia," if objected to before sale, would be insufficient; after sale and purchaser's rights have intervened, sufficiency should be left to jury, and the *fi. fa.* with this entry admissible. *Williams & Co. vs. Hart*, 201.
20. Sheriff's entry in levy as to who was in possession at date thereof, evidence of that fact; entry as to who died in possession, not evidence, and such entry will not change *onus*. *Ibid.*
21. Understanding of witness, without statement of facts on which based, as to what was levied on and sold, inadmissible. *Ibid.*
22. Declarations made by debtor in possession of property once his after formal title parted with, which creditor seeks to condemn as fraudulently conveyed, admissible in evidence against claimant. That claimant bought at sheriff's, not at private sale, makes no difference. *Ibid.*
23. What is sworn, is testimony; truth deduced therefrom, is evidence. *Ibid.*
24. Parol testimony inadmissible to vary written contract, but admitted to prove a custom of the trade or business in which contract was made, so universal as to warrant belief that it was by implication a part thereof. *Branch, Sons & Co. vs. Palmer*, 210.
25. Existence of custom, question for jury. *Ibid.*
26. Action by executor on note made by one for whom he is administrator, to enforce it against the indorser; on plea by defendant that plaintiff had received money from estate and paid off note since intestate's death, receipts for money given by plaintiff to agent in charge of part of estate perhaps admissible, but rejection no ground for new trial where plaintiff admits receipt of such money and only claims he properly applied it otherwise. *Haywood vs. Lewis, executor*, 221.
27. Parol proof inadmissible to take from, add to or vary written contract, yet in suit claiming that writing does not contain contract made, and praying its reformation, or if it should appear that no contract was made, then the refunding of money paid by plaintiff under mistake as to the existence of subsisting contract, parol and written testimony admissible to show what, or whether any, contract there was. *Cotton States Life Insurance Co. vs. Carter*, 228.



3. Demurrer should be filed and decided at the first term; but if an amendment is made, then a demurrer can be filed to the new case it presents. *Barnett et al. vs. People's Bank of Newnan*, 51.
4. Reform a deed made to secure a debt into a mortgage, equity cannot on the ground that the maker so understood and intended it, since the act of December 12th, 1871. *Ibid*.
5. Specific performance of a contract of sale by a trustee under power of sale on the written consent of the beneficiary, will not be decreed, though verbal consent be shown. *Berrien, trustee, et al. vs. Thomas*, 61.
6. Purchaser with notice, of property bought by executor at his own sale, is liable only to the extent of what he purchased, and not to the same extent as the executor. *Willis et al. vs. Foster, trustee*, 82.
7. Mistake relieved against with caution, and to justify relief the evidence must be clear, unequivocal and decisive as to the mistake. It must arise from ignorance, surprise, imposition or misplaced confidence, and be unmixed with negligence. The present does not make such a case. *Iverson, adm'r, vs. Wilburn, adm'r*, 103.
8. Writ of error lies immediately to the grant or refusal of an injunction, yet this speedy remedy does not lie to bill dismissed on demurrer, either at chambers or in term. *Sheibly et al. vs. The Georgia Southern R. R. Co.*, 107.
9. Motion filed to set aside verdict, and also bill covering all issues made by the motion, seeking the same object, it is not error to refuse to try motion separately first; equity having taken possession will retain the same, and make a final decree covering all issues raised by the bill and answer in nature of cross-bill. *McWilliams vs. Walthal et al., ex'rs*, 109.
10. Decree binding all property, without reference to sale of particular property and distribution of the proceeds, has the same force as regards interest as a judgment when contesting for money. *National Bank of Augusta vs. Heard*, 189.
11. Provision for sale of certain property and division of proceeds according to certain fixed priorities, naming amounts to be paid to claimants, and there is not enough to pay principal and interest, interest will not be given to one to exclusion of others. Net increase of property from which fund arose, in a receiver's hands, would be divided proportionally. *Ibid*.

- deed from the defendant in the equity case, the record in said case was admissible to show the chancellor's jurisdiction to make said decree, and also that the purchaser bought *pendente lite*. *Smith vs. Coker*, 461.
39. Declarations as to who shot him made immediately after he was shot, and had fled to the nearest house, by deceased shortly before he became unconscious, though made some hours before death, are admissible as dying declarations. *Dumas vs. State*, 472.
  40. Husband's indebtedness, evidence of, considered in determining whether or not a verdict allowing alimony is excessive. *Halleman vs. Halleman*, 476.
  41. Under the peculiar facts of this case, secondary evidence of note admitted. *Ibid*.
  42. Confessions to go to the jury must be adjudged by the court to be voluntary; then admitted only *prima facie* as having been so made. *Jones vs. State*, 506.
  43. Preliminary examination as to its admissibility in the presence of the jury, works no harm to defendant where the confession is admitted; otherwise, where it is excluded. *Ibid*.
  44. Prosecutrix cannot be asked as to statements made to an attorney in contemplation of his employment in the case; if she voluntarily testify as to a part of her conversation with him on direct examination, other side may inquire concerning the entire conversation. If she refuses to answer as to any part as tending to criminate her, the whole should be excluded. *Young vs. State* 525.
  45. Witness who had killed a man, left the country and has not been heard of for several years, and whose relatives cannot or will not state his whereabouts, is inaccessible, and secondary evidence of what he swore at first trial is admissible. *Gunn vs. Wades*, 537.
  46. Deeds from one to the other of several lessors in ejectment, whether void or voidable, are admissible to show privity between them, and to establish plaintiff's right to use their names. *Ibid*.
  47. Deed tendered by plaintiff conveyed no title, it should nevertheless be admitted and its effect construed by the court. *Ibid*.
  48. Execution on a decree holding deed a mortgage, levied on land, and the same claimed under a conveyance made pending the suit resulting in said decree, record of said suit is admissible to fix the date of the lien of the *fi. fa.* *Carter, adm'r, vs. Monroe et al.*, 542.

- out of land. The debtor cannot retain both the land and money. *Ibid.*
20. Wife filed bill in Crawford superior court against her husband, living in Crawford county, and her guardian, living in Upson county, praying relief only against guardian, said court has no jurisdiction. *Davis vs. McMichael et al.*, 395.
  21. Maker of absolute deed to secure debt cannot defeat ejectment brought thereon by plea of partial payment. He must tender balance and allege other reasons why to eject him would be unreasonable, and pray proper relief. *Robinson et al. vs. Alexander et ux.*, 406.
  22. Equitable claims of *fi. fas* equal, the oldest will take the fund. *Allen vs. Sharp, guardian*, 417.
  23. Purchaser of property condemned to sale for a particular debt by a common law court, but carried by the parties into equity, and sold by decree instead of under the common law judgment, buying *pendente lite*, is as much affected by that sale as if it had been made under said judgment. *Smith vs. Coker*, 461.
  24. Decrees moulded so as to meet the exigencies of each case. *Ibid.*
  25. Sale by a commissioner in equity does or does not require confirmation accordingly as made under interlocutory or final decree. *Ibid.*
  26. Head of family should bring suit to recover homestead in the absence of reason shown to the contrary, and a bill filed by the beneficiaries of the homestead, no reason being shown why the head of the family did not sue, was demurrable. *Shattles, guardian, vs. Melton*, 464.
  27. Suit brought in July, 1876, by beneficiaries of homestead sold in 1873, to recover it, too late in 1880 to amend by making head of family a party complainant. *Ibid.*
  28. Proof need not be *conclusive*, and to so charge is error; especially where the answer is not sworn to and discovery is waived. *DeLaigle vs. Denham*, 482.
  29. Executrix contracted an account for plantation and family supplies, money, etc., and gave her note as executrix therefor, intermarries and dies, and the legatees agree with her husband, the administrator *de bonis non*, to settle a bill for account against him by a decree turning over the estate to them, they paying the debts, and the estate, mainly land, is about to be turned over without paying debts, there being no

60. Written contract, action on, and no plea filed, and defendant dead at time of trial, his administrator cannot prove conversation of deceased with third party concerning settlement of liability. *Ibid.*
61. Testimony as to the measurement of a track is admissible without producing the measure itself. *Wade vs. State*, 756.
62. Conversation between deceased and another in relation to a difficulty he had with third party, not prisoner, in which violent language had been used, is not competent testimony. *Ibid.*
63. Claim case arising under a *fi. fa.* against the second holder of a title, record of an ejectment cause between the third holder and the claimant in admissible. *Lanier vs. Brooker*, 761.

#### EXECUTIONS.

1. Contest between *fi. fa.* on a judgment founded on note given "for purchase money" of certain real estate, and younger *fi. fa.* founded on judgment against the specific property, it is competent to show that note was given for such purchase money; and if shown, the older *fi. fa.* will take fund raised from sale of said property. *Allen et al. vs. Sharp, guardian*, 417.
2. Equitable claim of *fi. fas.* being equal, the oldest will take the fund. *Ibid.*
3. Vendor who had given bond for title filed deed to vendee, and levied on and sold property under *fi. fa.* issued on judgment for the balance of purchase money due; in a contest between his *fi. fa.* and a younger one founded on a debt for money borrowed to pay part of said purchase money, the vendor's *fi. fa.* is the superior lien. *Ibid.*
4. Equitable plea to ejectment, jury find the deed relied on by plaintiff to be a mortgage, and a certain sum for plaintiff, and that it be a lien on the land covered by said deed, an execution for said sum followed the decree. *Carter, adm'r, vs. Monroe et al.*, 542.
5. Execution levied on said land, and it was claimed under a conveyance made pending such suit, record thereof admissible to fix date of lien of *fi. fa.* *Ibid.*

See *Judgments*, 11.

**FEES.** See *Costs*, 2, 4; *Sheriff*, 3.

#### FERTILIZERS.

1. Where a fertilizer, known as "Stonewall, No. 1" is imported in casks, legally analyzed and inspected, and is manipulated with

other ingredients, then sacked and sold, without further analysis or inspection, as "Stonewall, No. 2," it falls within the prohibitory law of 1874. *Johnston, Bros. & Co. vs. McConnell et al.*, 129.

2. Note given for such fertilizer is void even in the hands of a *bona fide* purchaser for value, before due, without notice, because based on an illegal consideration. *Ibid.*

FOREIGN CORPORATIONS. See *Jurisdiction*, 7.

FRAUD AND FRAUDULENT CONVEYANCES. See *Deeds*, 6, 7; *Trusts*, 2.

GOOD WILL. See *Sales*, 1.

GUARDIAN AND WARD. See *Contracts*, 29, 30.

HABEAS CORPUS.

1. Imprisonment under an alternative verdict in trover, which had become absolute for money, defendant moves by petition, and not by *habeas corpus*, to be discharged, and court passes an order of discharge, and plaintiff excepts, he is entitled to a *supersedeas* to such order on such terms as case demanded. *Southern Express Company vs. Lynch*, 240.
2. *Habeas corpus* is the proper remedy to discharge one illegally imprisoned with or without form of law. Superior court, after final judgment, has no right to discharge one imprisoned by any other proceeding. *Ibid.*

HOMESTEAD.

1. Wife's right to, in order to protect, deed to secure debt cannot, since act of December 12th, 1874, be reformed into a mortgage on the ground that the makers so intended and understood it. *Barnett et al. vs. People's Bank of Newman*, 51.
2. Husband and wife, with the ordinary's approval, made deed to their homestead, set apart under the act of 1868, to secure the payment of borrowed money, and took a bond for reconveyance on its repayment, remaining in possession, and the creditors took judgment and filed a deed to the husband, and had a levy made, land not subject. *Saulsbury, Respass & Co. vs. McCallum, adm'r*, 102.
3. Seller of horse owed plaintiff for land, and by agreement the purchaser of the horse gave plaintiff his note, and he credited his debtor on the land with the amount thereof, the consider-

ation of said note was the extinguishment of the debt for land, not purchase money of horse, so as to render it subject to a judgment after it had been set apart as exempt. *Washington vs. Cartwright*, 177.

4. Affidavit of illegality by widow, on ground that execution was levied on the homestead set apart to her husband, not demurrable because it failed to state that plaintiff in *fi. fa.* had not filed affidavit that his claim belonged to class of debts for which homestead was liable. *Buchanan vs. Willingham*, 303.
5. Exemption can only be set apart in property then owned. Where applicant, who owned neither, included in his petition for exemption "one farm horse or mule," and it is allowed, same will not exempt horse subsequently bought. *Smith vs. Eckles & Abercrombie*, 326.
6. Application for exemption must affirmatively disclose whether it is claimed for property as wife's or husband's, and if it does not, exemplification of proceedings properly excluded. *Coffee vs. Adams*, 347.
7. Bankrupt, homestead set apart to without objection, and approved, bankrupt court loses all jurisdiction over it, and claims superior to the exemption should be enforced in a court having jurisdiction, and not against the assignee by petition to the bankrupt court. *Phillips vs. Bass et al.*, 427.
8. Head of the family should bring suit to recover homestead, in the absence of reason shown to the contrary, and a bill filed by the beneficiaries of the homestead was demurrable. *Shattles, guardian, vs. Melton*, 464.
9. Suit brought in July, 1876, by beneficiaries of homestead sold in 1873, to recover it, too late in 1880 to amend by making head of family a party complainant. *Ibid.*
10. Deed to homestead set apart under the constitution of 1868, and the laws passed thereunder, is not void, under article 9, section 8, paragraph 1, of constitution of 1877. *Gunn vs. Wades*, 537.
11. Deed conveying homestead to secure debt to which it was subject, passes title. *Ibid.*
12. Ejectment pending at the date of act of 1876, brought on the demises of the homestead beneficiaries and purchasers from them, if the conveyance of homestead was void, yet title remained in said beneficiaries, and a recovery could be had on their demise. *Ibid.*

13. Heir owning an undivided one-third interest in lands, mortgaged his interest in 1867, the sale, on foreclosure of said mortgage, conveyed said undivided one-third interest, and the purchaser became a tenant in common with the other heirs, though before such sale said heirs had divided the mortgaged premises, and the mortgagor had taken a homestead in the part allotted him. *Ibid.*
14. Constitution of 1868, and Code, §2016, require that cash must be invested before finally exempted by the ordinary. An exemption of money is void as against a debt prior to 1877. *Jones vs. Ehrlich, 546.*
15. Judge or register grants an exemption in bankruptcy, it is as free from levy and sale as if set apart by ordinary, without further proceedings. *Ross, administrator, vs. Worsham, 624.*
16. Homestead set apart by ordinary under constitution of 1868, and approved by bankrupt court, is subject to a judgment on contract made prior to said constitution and the bankrupt act. *Dixon vs. Lawson et al., 661.*
17. Written waiver, since the constitution of 1877 and the act of 1878, good between parties, without setting it forth in pleadings, judgment or *fi. fa.*, and can be proved *aliunde* after judgment, whether judgment be general or special, or waiver be separate or in contract sued on. *Flemister vs. Phillips—Wedington vs. Florence, 676.*

#### HUSBAND AND WIFE.

1. Verdict against wife on note signed by herself and husband, the uncontradicted evidence showing it to be for his debt, she receiving no benefit, illegal. *Brent vs. Mount, 92.*
2. Marriage between persons of color in December, 1865, if illegal, which is not apparent, yet, if living together as man and wife at the date of the act of 1866, the marriage relation was thereby established and bigamy could be predicated thereon. *Kirk vs. State, 159.*
3. Joint property sold by husband and wife, and former uses portion of purchase money, that act, without more, would not destroy their joint tenancy in land bought with the rest. Husband would be wife's debtor for her share of the money used. *Hathorn et al. vs. Maynard, 168.*
4. Alimony is granted in pending divorce suits, and where there is a voluntary separation, and where husband abandons wife.

In these latter cases equity may by decree compel husband to make provision for support of wife and children. *Gray Bros. et al. vs. Gray*, 193.

5. Voluntary marriage would not exempt married woman from the running of a prescription which began when she was a *feme sole*. *Sparks vs. Roberts*, 571.
6. Married woman's act of 1866, the constitution of 1868, and the act of 1872, enable married women to sue, and prescriptions previously suspended then began running against them. *Ibid*.
7. Sale to wife on her own credit, not binding on husband, though seller expected her to get money from husband to pay for them. *Morris vs. Root*, 686.

#### ILLEGALITY.

1. Question settled by verdict cannot be raised by affidavit of illegality. *Saulsbury, Respess & Co. vs. Blandys*, 45.
2. Affidavit by widow, on ground that execution was levied on the homestead set apart to her husband, not demurrable because it failed to state that plaintiff in *fi. fa.* had not filed affidavit that his claim belonged to class of debts for which homestead was liable. *Buchanan vs. Willingham*, 303.
3. Levy of executions does not state as whose property seizure is made, no ground of illegality. *McKay vs. Edwards*, 328.
4. Levy on land, illegality thereto, based on falsity, of return of "no personal property to be found," insufficient to allege that defendant had personal property; it must be distinctly averred that defendant had same at date of levy, and that it was subject. *Ibid*.
5. Tax collector and sureties, illegality not the proper remedy to an execution issued by the comptroller-general against. *Manning vs. Phillips et al.*, 548.
6. Court, illegality can only be used as a remedy to an execution issued from. *Ibid*.

INDICTMENT. See *Criminal Law*, 25, 31.

#### INDORSEMENT.

1. Contract for payment to landlord by cotton and money for rent and provisions, indorsed by him, "I hereby transfer, assign and indorse," made landlord an indorser for value, and liable without first showing insolvency of maker. *Smith vs. Brooks*, 356.



2. Plea that before debt became due, indorser notified holder to make money out of cotton then in tenant's hands subject thereto, which he afterwards disposed of, and debt was lost, is demurrable, especially as county of principal's residence was not stated in notice. *Ibid.*
3. Contract between indorser and payee of a note, distinct from that between payee and maker. *Freeman, executor, vs. Bigham, 580.*

## INFANCY.

1. Legal majority is 21 years of age. All persons, male or female, younger are infants. *Dent vs. Cock, 400.*
2. Indentures of apprenticeship, during minority, vest master with no greater right over female apprentice than parent has; and on her reaching age of eighteen years are not void as in restraint of marriage. *Ibid.*

## INJUNCTION.

1. Blacksmith shop, discretion of chancellor enjoining erection of, will not be controlled, where the circumstances, in his opinion, making it a nuisance, preponderate, though it may not be a nuisance *per se*. *Whitaker vs. Hudson, 43.*
2. Deed of trust authorizing sale of estate on written consent of beneficiary, and trustee sells without such consent, ousting of purchaser not enjoined. *Berrien, trustee, et al. vs. Thomas, 61.*
3. Trust estate solvent, court will not grant injunction, to enable itself to decree payment to the purchaser for improvements, the prayer being only for specific performance. *Ibid.*
4. Refusal of injunction in this case proper. *Georgia Penitentiary Co., No. 2, et al. vs. Nelms et al., 67.*
5. "Fast writ of error" lies to grant or refusal of injunction, but not to decree dismissing bill on demurrer at chambers or in term. *Sheibly et al. vs. Georgia Southern Railroad, 107.*
6. Mortgagee alleging that a senior mortgagee held but an equitable mortgage, though in form an absolute deed, and that by reason of usurious payments his debt was nearly paid, that he was about to sell to an innocent purchaser, etc; the evidence being conflicting, discretion not abused by grant of an injunction. *Brumby, trustee, vs. Bell, 116.*
7. Alimony, injunction granted as well against others co-operative with him as against husband, to prevent alienation of property to defeat. *Gray Bros. vs. Gray, 193.*

8. Ordinance levying tax on gross sales of cotton on commission by warehousemen, etc., conflicts with act of 1873, prohibiting municipal corporations from levying tax on cotton, or the sales thereof, and its enforcement was properly restrained by injunction. *Mayor and Council of Columbus vs. Flournoy & Epping et al.*, 231.
9. Affidavits conflicting, discretion granting injunction not controlled. *Rahilly et al. vs. Horton*; *Sum. Mac. R. Co. vs. Rohler*; *Cottle et al. vs. Cottle et al.*; *Franke vs. Berkner et al.*, 303.
10. Sale under *f. fa.* not enjoined to allow wife of defendant to contest with holder and transferee as to her right to an interest therein; court will order sheriff to retain enough of proceeds to protect her interest. *Thomas vs. Wilkinson et al.*, 405.
11. Libel, equity will enjoin publication of, and this principle applies to equitable rights arising under patent laws of the United States, legality of patent not being subject of inquiry, but only collateral to the relief sought. In this case refusal of injunction was no abuse of discretion. *Bell & Co. vs. Singer Manufacturing Co.*, 452.
12. Temporary injunction of an execution pending suit is proper, where a perpetual injunction thereof on final decree would follow. *McLendon vs. Turner*, 577.
13. Action at law not restrained where defenses can be fully set up therein. Concurrent jurisdiction of law and equity courts has been enlarged, and the court first taking will retain, except on good cause shown. *Northeastern R. R. Co. vs. Barrett et al., executors*, 601.
14. Right-of-way, allegations that judgment on a writ *ad quod damnum* had been rendered in complainant's favor against railroad company for property condemned as, the title thereto to vest in said company on payment of sum assessed, but establishing no special lien thereon; that pending these proceedings said company became insolvent and was sold under decree to defendant, who was using said land as a part of its right-of-way, and praying injunction of such use until payment of sum assessed, and general relief, is not demurrable. Common law furnishes no remedy. *Gammage vs. Georgia Southern R. R. Co.*, 614.
15. Complainant being in laches, refusal of temporary injunction not interfered with, but chancellor directed to submit to the

jury whether defendant be not enjoined, if judgment not paid in a time to be by them fixed. *Ibid.*

16. Judgment at law on the draft itself in favor of one surety against another, the issue being was he a co-surety and liable for contribution at all, will not bar a bill to enjoin such judgment involving new issues and parties, filed by co-surety as such. *Simmons vs. Camp, 673.*
17. Pleadings vague and uncertain, no error in refusing an order nisi. *Ibid.*

## INTEREST AND USURY.

1. Decree binding all property, without reference to sale of particular property and distribution of the proceeds, has the same force as regards interest as judgment, when contesting for money. *National Bank of Augusta vs. Heard, 189.*
2. Decree providing for sale of certain property and division of proceeds according to certain fixed priorities, naming amounts to be paid to claimants, and there is not enough to pay principal and interest, interest will not be given to one to the exclusion of others. Net increase of property from which fund arose, in a receiver's hands, would be divided proportionally. *Ibid.*
3. Plea setting up right to recover usury on notes in suit, only authorizes recovery of that, although usury may have been paid on other notes between same parties. *Haywood vs. Lewis, executor, 221.*
4. Note for \$172.00, with twelve per cent interest, given in 1876, for a loan of \$150.00, is usurious and works a forfeiture under act of 1875. *Lanier vs. Cox et al., 265.*
5. Forfeiture for usury under act of 1875 was only the interest and excess; the entire principal loaned could be recovered, and that, whether interest and usury were unpaid or had been paid, and were sued for or set off against a suit for the principal. *Ibid.*
6. Interest due and payable by contract at fixed time, itself bears interest if not then paid. *Tillman et al. vs. Morton, 386.*
7. Usury, plea of must set out amounts, dates, etc. *Ibid.*

## JUDGMENTS.

1. Equitable defense requiring the introduction of new parties not concluded by judgment at law. *Waters et al., ex'rs, vs. Perkins, 32.*

2. Verdict for the plaintiff for certain amount without mentioning defendant, it is against the defendants who were made parties to the case, and no others; and a decree against such defendants only follows the verdict.—*Saulsbury, Respess & Co. vs. Blandys*, 45.
3. Action for purchase money of land in 1866, to which defendant filed plea under relief act of 1868, and a verdict was rendered, "for the plaintiff, the return of the land." A judgment was entered thereon in 1870, that plaintiff recover of defendant certain described land which the latter had bought of him. Such verdict and judgment are not void for uncertainty. *McWilliams vs. Walthall et al., ex'rs*, 109.
4. Order discharging defendant in trover, with bail process, on his own recognizance, is not such final judgment as authorizes a writ of error. *Marks vs. Hertz*, 119.
5. Title to land bought by executor at his own sale being only voidable, land is subject to judgment rendered against him whilst he so held title. *Thornton, ord'y, vs. Willis, trustee*, 184.
6. *Fi. fa.*, none issued on judgment, or if issued no levy made, and to revive which no steps have been taken, cannot be revived after ten years. *Seibels vs. Hodges*, 245.
7. Appeal cause, judgment in by court, without a verdict, is illegal, and where papers show this, *scire facias* to revive same should be dismissed. *Ibid.*
8. Newly discovered evidence, though this court would not have opened judgment on account of, deeming party negligent, yet it will not control discretion of the court below so doing. *Wakefield vs. Moore, sheriff, et al.*, 268.
9. Rule absolute against sheriff is not final and conclusive like judgment. It is the dealing of the court with its defaulting officer, and can be renewed or annulled at the same or subsequent term upon motion, on showing made that sheriff was not in contempt. *Ibid.*
10. Division of lands by commissioners, on application of administrator, and return made to the ordinary, share allotted to an heir is subject to judgment against him. That administrator never accepted the heir's receipt for the land makes no difference. *DuBose, administrator, vs. Cleghorn, Herring & Co. et al.*, 302.
11. Follow judgment in favor of "R. P. Hooper and his wife for use of L. P. Hooper," *fi. fa.* in favor of "R. P. Hooper

- and Louisa P. Hooper" does not. *Shackleford vs. Hooper et ux.*, 366.
12. Decree accords with verdict. *DeLaiçle vs. Denham*, 482.
  13. Law and evidence, judgment supported by. *Dahlonga Gold Mining Co., vs. Purdy*, 496.
  14. Bankruptcy pleaded to a suit brought in Georgia on a judgment rendered in Tennessee, where it appeared that defendant was adjudged a bankrupt pending the suit in Tennessee, but failed to plead that fact or to ask a stay of suit therefor, and the judgment was rendered and he subsequently discharged; such decree barred a recovery. The Tennessee judgment was no new debt, but a security for the old, and of itself without force in Georgia. *Anderson vs. Anderson*, 518.
  15. Ordinary, judgment by, against county treasurer and his sureties, for a deficit which he had failed to pay on demand, said ordinary having previously passed a judgment finding that said treasurer had abandoned his office and left the county, and declaring the office vacant and appointing a temporary successor, is a legal judgment, and the *fi. fa.* issued thereon should not be quashed on demurrer. *Jones, ord'y, vs. Collier et al.*, 553.
  16. Process returnable to April term, 1873, of Twiggs superior court, was served fourteen days before said term, and the bench docket showed counsel marked and the following entries by the judge: "Oct. adj., 1873, appearance term of term. April T., 1874. put to heel. Oct. T., 1874, judgment," the judgment being by default, the defect in service was waived. *Lowe, guardian, vs. Burkett*, 564.
  17. Makers and indorsers, action against, and judgment rendered against two, they only being served, it barred another suit as to them, *Fullington, for use, vs. Killen, administrator, et al.*, 575.
  18. After-acquired property of bankrupt is not subject to a judgment rendered before bankruptcy, although not proven in bankrupt court. *McLendon vs. Turner*, 577.
  19. Bonds feloniously taken and disposed of, prosecution of taker is not condition precedent to suit to recover them from a third person, and a judgment in such suit would conclude the question of such prosecution on a bill in equity based thereon. *Merchants' and Planters' National Bank et al. vs. Trustees of Masonic Hall*, 603.

20. Contract made prior to the constitution of 1868 and the bankrupt act, judgment on, homesteads set apart under both is subject thereto. *Dixon vs. Lawson et al.*, 661.
21. Deed to land or a bill of sale to personalty, given to secure debt, passes title and protects the property against all liens thereafter created, and this, whether wife's consent was obtained or conveyance recorded. *Cecil & Thrasher vs. Gasan*, 689.
22. Commissioners of Whitfield county cannot, under act of 1872, render a judgment except as to roads; if they had judicial power as to claims against the county, refusal to pay unaccompanied by judgment as to correctness or incorrectness, would not be conclusive. *Cox vs. Commissioners of Whitfield County*, 741.
23. Lien of judgment against vendor of property derived from one who bought at sheriff's sale under a *fi. fa.* against an original vendor, who had outstanding a bond for title on which part of the purchase money had been paid, though he had acquired such title under an agreement with the holders of such bond, the title being in him by actual purchase, was subject thereto. *Lanier vs. Brooker*, 761.
24. Original holders of said bond for title had no interest in the land which they could convey to the purchaser at the sheriff's sale against their vendor, or to those substituted for him, and therefore were not protected by the act of 1871 and 1872. *Ibid.*

## JURISDICTION.

1. Mortgage on personalty must be foreclosed in the county where mortgagor resides, if in the state, and this should appear by the record. *Rich vs. Colquitt, governor*, 113.
2. Bill filed against corporation, two non-residents and their attorney, praying delivery of stock certificate owned by the non-residents and in the hands of attorney, and enjoining corporations from paying dividends, and praying issue of new certificate, superior court of county of corporation had jurisdiction, though the attorney lived elsewhere. *Moses vs. Watson*, 196.
3. Justice of district of defendant's residence being disqualified, suit was brought and tried on merits before justice of another district, without objection, judgment for plaintiff was valid. *Dozier vs. Allen*, 255.

4. Wife filed a bill in Crawford superior court against her husband, living in Crawford county, her guardian, living in Upson county, praying relief only against the guardian, said court had no jurisdiction. *Davis vs. McMichael et al.*, 395.
5. Ordinary, courts of have general jurisdiction of granting or revocation of letters of administration, and the judgment granting letters cannot be collaterally attacked on ground of non-residence of decedent in county, especially where it recites that deceased was of said county. The attack must be made directly in the court where it was rendered. *Tant et al. vs. Wigfall*, 412.
6. Homestead set apart to bankrupt without objection, bankrupt court loses all jurisdiction over it, and claims superior to the exemption should be enforced in court having jurisdiction, and not against the assignee by petition to the bankrupt court. *Phillips vs. Bass et al.*, 427.
7. Foreign corporation contracts with machinist out of state for work to be done on property located here, courts of this state may enforce his lien on such property. The case of *Bawknight vs. Liv. & Lon. & G. Ins. Co.*, 55 Ga., 194. distinguished. *Daklonega Gold Mining Co. vs. Purdy*, 496.
8. Ordinary has jurisdiction to pass order finding that county treasurer has left the county, abandoned his office, declaring the same vacant, temporarily filling it, and to enter judgment against said treasurer and his sureties for a deficit. *Jones, ordinary, vs. Collier et al.*, 553.
9. Justice court held in 1872, at the time named in the summons, to try demand for more than fifty dollars, summons being returnable in less than twenty days, is without jurisdiction. Such defect cannot be waived by agreement, and evidence thereof is inadmissible. *Thurston et ux. vs. Wilkerson*, 557.
10. Action against two makers of note barred by former recovery, their residence could not give the superior court of their county jurisdiction of a subsequent suit against all the makers and indorsers. *Fullington, for use, vs. Killen, adm'r, et al.* 575.
11. Chancellor at chambers has jurisdiction to order sale of part of trust estate to pay debt which was an incumbrance on whole estate, *cestui que trust* assenting, and all parties having notice and being represented. *Iverson, trustee, et al. vs. Saulsbury, trustee, et al.*, 724.

See *Mortgage*, 2; *New Trial*, 1.

## JURY.

1. Impeach their verdict, jurors cannot. *Smith, governor, vs. Banks et al.*, 26.
2. *Voir dire*, jurors put on, can be asked only the statutory questions. If further investigation is desired, they should be put upon the court as a trior. *Johnson vs. State*, 94.
3. Case on trial was discussed near jury, it appearing that they heard nothing that could have influenced verdict, no ground for new trial. *Brown vs. State*, 332.
4. Plaintiff's counsel remarked in public place that he had been down several times about these cases, and hoped to get through with them, and juror, without his knowledge, heard remark, no ground for new trial. *Rockdale Paper Mills vs. Stevens*, 380.
5. Practice of administering oath to twelve jurors at once, preliminary to examination on *voire dire*, commended. *Roberts vs. State*, 430.
6. Swear jurors in chief until full panel is obtained, failure to is not error. *Ibid.*
7. Statutory questions, juror not understanding, court may explain, and if he then answer differently, qualifying himself, it is no ground for new trial. *Dumas vs. State*, 472.
8. Talesman summoned cannot be struck for cause, because they form a part of an array of jurors to which a challenge has been sustained in same case. If the second panel was illegally summoned, array should have been again challenged. *Ibid.*
9. Special jury for the trial of appeals from justice courts, is to be taken from the panel of traverse jurors, not from the grand jury. *Cronan vs. Roberts & Co.*, 678.
10. Although a juror appear competent when put on *voire dire* and sworn in chief, still he can be proved incompetent, and rejected. *Wesley vs. State*, 731.

## JUSTICE COURTS.

1. Residence of defendant, justice of district of being disqualified, suit was brought and tried on merits before justice of another district, without objection; judgment for plaintiff was valid. *Dozier vs. Allen*, 255.
2. Constitution of 1877 requires that justices and notaries must hold court at same time and place in their respective districts. *Tarpley vs. Corput*, 257.



3. Two suits by same plaintiff against same defendant brought to same term of justice court, same or no defense being to both, and aggregate amount within justice court's jurisdiction; should be consolidated on motion. *Ibid.*
4. Constable's election, justice of the peace not a candidate at same election must be one of the managers. Such officer acting only part of day, renders election illegal. *Franklin vs. Kaufman et al.*, 260.
5. Constable, failure to elect, or if elect fails to qualify, there is vacancy, and magistrate should appoint. *Ibid.*
6. Continuance not granted to party in justice court for sickness of material witness, for whom no subpoena had been issued, and whom the justice had seen shortly before court apparently well. *Rivers vs. Hood*, 302.
7. Appeal to a jury in the justice court dismissed on trial, party cannot have *certiorari* to the original judgment, even though the application be made within three months from its rendition. *Miller vs. Hensley*, 556.
8. Jurisdiction, justice court held to try a demand over fifty dollars, on a summons issued and made returnable in 1872, less than twenty days, was without. An agreement to waive did not cure such a defect, nor was evidence to show such an agreement admissible. *Thurston et ux. vs. Wilkerson*, 557.
9. Admission of writing in evidence by justice with remark that he thought it was worth but little, but that the jury being judges of the law and evidence, he would leave it to them, is good ground for *certiorari*. *West vs. Black*, 647.
10. Constitution of 1877 requires that justice courts be held at fixed times and places; distress warrant made returnable to next term of justice court, without specifying day on which it is held, sufficient. *McCray vs. Samuel*, 739.

#### LANDLORD AND TENANT.

1. Term enjoyed by tenant without interruption, or being required to attorn to another, he cannot recover rents paid to his landlord, though the land be afterwards recovered from such landlord by ejectment or voluntary surrender. *Dwinell vs. Brown*, 438.
2. Emblements, tenant at will or his legal representatives, whether death of tenant or notice terminates tenancy, is entitled to. *Morgan vs. Morgan*, 493.
3. Land rented from another, although he may not own it, relation of landlord and tenant, and liability to pay rent, exists. *Ibid.*

4. Demand for payment is necessary as a condition precedent to enforcement of landlord's lien on crops, but not his general lien on tenant's property by distress warrant. *McCray vs. Samuel*, 739.
5. Two demands for rent due for consecutive years, the amounts being liquidated, landlord may or may not, at his option, unite the same in one distress warrant. *Ibid.*  
See *Evidence*, 37.

## LAWS.

1. Code, §2791, gives minor children a right of action for the homicide of their mother, and does not restrict their right to the homicide of the father. *Atlanta & West Point Railroad vs. Venable, next friend*, 55.
2. Legislature cannot by resolution change the obligation of a contract made under a previous act; but such resolution, instructing an official as to his duties under contract, is evidence of the legislative intent in passing act. *Georgia Penitentiary Co. No. 2 et al. vs. Nelms et al.*, 67.
3. Convict-lease act of 1876, Marietta and North Georgia Railroad had a right paramount to that of the lessees to the services of 250 convicts on complying with the conditions precedent. *Ibid.*
4. Donation or gratuity, act of the general assembly furnishing certain convicts to a railroad to work free of charge, said road to give bond to entirely provide for them and their safe keeping, is not such, within the meaning of the constitution, as requires that such act should be passed by two-thirds majority of both branches of general assembly, and the ayes and nays entered on the journal. *Georgia Penitentiary Co. No. 2 et al. vs. Nelms, principal keeper, et al.*, 499.

## LEVY AND SALE.

1. Sheriff sells and purchaser buys according to the process and levy thereunder. *Frost vs. Render*, 15.
2. Sale under levy on land as property of defendant in *fi. fa.*, carries with it the growing crop, and sheriff cannot limit by announcement that current year's rent is reserved. *Ibid.*
3. Tax *fi. fa.* for less than \$100.00 levied on land, without an entry of "no personalty" thereon, valid. *Plant vs. Eichberg*, 64.

4. Illegal levy, time land is held under, cannot be tacked to subsequent levy to prevent the four years' bar of the statute of limitations in favor of a purchaser without notice, although he had been a claimant under both levies. The Code omits the word "peaceable," qualifying the possession, and land must be seized by a legal levy before the bar of the statute will attach. *Zimmer vs. Dansby*, 89.
5. Entry on *fi. fa.*, describing the property as a house and lot in a certain town, county and state, formerly owned by one person, wherein a certain man then (at date of levy) resides, and as having been attached as the property of another person, is sufficiently certain. *Longworthy vs. Featherston*, 165.
6. Court-house burned, and no other substituted therefor, but court held at place which is used during rest of year for other purposes, and the clerk's office at another, sheriff's sale on the site of the burnt court-house, or adjourned therefrom for cause to place in full sight, valid. *Ibid.*
7. Title to land bought by executor at his own sale, being only voidable, land is subject to judgment rendered against him. *Thornton, ordinary, vs. Willis, trustee*, 784.
8. Description in levy, "On nine hundred acres of land, as the property of James B. Hart, one of the defendants, said property being situated and in the vicinity of Union Point, Greene county, Ga.," if objected to before sale, would be insufficient; after sale, and purchaser's rights have intervened, sufficiency should be left to jury. *Williams & Co. vs. Hart*, 201.
9. Sheriff should state in levy who is in possession, and his entry is evidence thereof, but is not, of who died in possession. Such last entry not relieve plaintiff in *fi. fa.* of *onus*. *Ibid.*
10. Claim interposed, new levy made without an order withdrawing *fi. fa.* from claim papers illegal. That first levy is illegal does not aid second. *State vs. Feter*, 256.
11. Affidavit of illegality by widow on ground that execution was levied on homestead set apart to her husband, not demurrable because it failed to state that plaintiff in *fi. fa.* had not filed affidavit that his claim belonged to class of debts for which homestead was liable. *Buchanan vs. Willingham*, 303.
12. Execution against sole defendant, levy need not state whose property is seized. *McCoy vs. Edwards*, 328.
13. Cotton in field not matured is not subject to levy and sale, and purchaser of it in its then condition from defendant in *fi. fa.*

- gets a good title as against an older judgment against his vendor. *Scolley vs. Pollock*, 339.
14. "Levied this *fi. fa.* on 126 acres of land as the property of M. O. Elder" too uncertain. *Osborn vs. Elder*, 360.
  15. Mere fact that large amount of property was sold for taxes at much less than value, will not raise presumption that levy was excessive and sale void. *Shackleford vs. Hooper et ux.*, 366.
  16. Dismissed, levy may be without leave of court, after claim or other issue pending thereon, and a subsequent levy is good. *Ayers vs. Lamb*, 627.
  17. Levy on all "the crops on the Ball place" is specific enough to prevent its dismissal, especially at the instance of a claimant. *Crine vs. Tifts & Co.*, 644.
  18. Discrepancy between attachment and levy as to whose possession property was in, immaterial after replevy. *Cooper, adm'r, et al. vs. Lockett*, 702.

## LIBEL.

1. Equity will enjoin the publication and circulation of a libel, and this principle applies to equitable rights arising under the patent laws of the United States, the legality of the patent not being the subject of inquiry but only collateral to the relief sought. *Bell & Co. vs. Singer Manufacturing Co.*, 452.

## LIENS.

1. Laborer's lien against real estate must be foreclosed as provided in §1980 of the Code, and the pleadings, verdict, judgment and execution must set forth the lien and the premises on which it is claimed. *Snow vs. Council*, 123.
2. Contest between a *fi. fa.* issued on a judgment founded on a note given "for purchase money" of certain real estate, and a younger *fi. fa.* founded on a judgment against the specific property, it is competent to show that note was given for such purchase money, and if shown the older *fi. fa.* will take the fund raised from sale of said property. *Allen et al. vs. Sharp, guardian*, 417.
3. Execution for balance of purchase money due for property held under bond, in contest with junior *fi. fa.* over proceeds of sale of property, deed having been filed, has superior lien. *Ibid.*

4. Contractor's lien, suit on must be brought within twelve months from date of record. Filing of declaration, not followed by proper service on defendant, is not commencement of suit. *Cherry, for use, vs. The North & South R. R.*, 633.
5. Contractor's lien on railroad which has been seized by governor, failure to sue within twelve months from record destroys lien. Such seizure did not abrogate its obligations to others. *Ibid.*
6. Deed to land, or a bill of sale to personalty, given to secure a debt passes title and protects the property against all liens thereafter created, and this, whether wife's consent was obtained or conveyance recorded. *Cecil & Thrasher vs. Gazan*, 689.
7. Demand for payment is necessary as a condition precedent to enforcement of landlord's special lien on crops, but not of his general lien on tenant's property by distress warrant. *McCray vs. Samuel*, 739.

#### LIMITATIONS, STATUTE OF.

1. Action on note pending in 1868 in county court, when they were abolished, the papers lost and never re-established, and it was never transferred to the superior court; in 1875 it was compromised by a part payment, and a parol promise to pay the balance of said compromise; the suit in the county court being virtually abandoned in 1868, the statute of limitations began to run, and more than six years having elapsed before the compromise, such original claim was barred, and said parol promise could not revive it. *Mosely et al. vs. Jenkins, guardian*, 49.
2. Illegal levy, time land is held under cannot be tacked to subsequent levy to prevent four years' bar of the statute of limitations in favor of purchaser without notice, although he had been a claimant under both levies. The Code omitting the word "peaceable" qualifying the possession, a legal levy made before the bar of the statute attaches is essential. *Zimmer vs. Dansby*, 89.
3. *Scire facias* barred, where ten years elapsed from date of judgment, no *fi. fa.* having issued, if issued, no levy being made, and no step taken to revive same. *Seibels vs. Hodges*, 245.
4. Guardian invested wards' funds in Confederate bonds in 1864, without an order of court, wards' cause of action accrued then, and a suit thereon brought in 1870, over nine months and sixteen days after removal of disabilities of infancy, etc.,

was barred by the act of 1869. *Munroe et al. vs. Phillips, adm'r, 390.*

5. Will provided a life-estate in all the property for the widow, at her death remainders in certain land, and a distribution of the personalty in the manner and between the persons therein specified, the negroes to be parceled out as equally as possible, differences in value of lots to be made up in money, and the executor in 1857 returned cash on hands left at testator's death, but never paid it over, and died in 1866, his estate remaining unrepresented until 1876, and the widow died in 1877, a suit brought in 1879 by the administrator *de bonis non* of original testor, was barred by the act of 1869; the will did not intend that said cash should be retained to equalize division on death of widow, but that that should be done by inter-payments between legatees, and the cause of action accrued when the executor retains funds for future equalization. *Summerlin et al., adm'r, vs. Dorsett, adm'r, 397.*
6. Attorney to collect note from principal was himself second indorser; the statute ran as to him from time when the debt was non-collectible from principal, and the attorney's liability was apparent to the client. *Freeman, ex'r, vs. Bigham, 580.*
7. Proof showing that plaintiff, having ceased selling defendant goods, then sells and charges to wife, such sale will not bring husband's account which has stood for more than four years, within statute of limitations. *Morris vs. Root, 686.*
8. Open accounts are barred in four years from time right of action accrues. Accounts between merchant and merchant, concerning the trade, and mutual accounts, are exceptions to rule. *Ibid.*

See *Homestead, 9; Liens, 4, 5.*

LIS PENDENS. See *Equity, 23.*

#### LOST PAPERS.

1. Copy of lost amendment filed at a previous term, may be established at the trial in the absence of an entry on the bench docket, or an order on the minutes allowing same, and on other evidence than that upon the records of the court. *Strange, adm'r, vs. Barrow et al., ex'rs, 23.*

#### MANDAMUS.

1. Supreme court will not grant *mandamus* to compel signing and certifying of a second bill of exceptions, unless such second

bill makes an extraordinary case as specified in Code, §3721 to-wit: a case not ordinarily occurring in human affairs. *Cox, relator, vs. Hillyer, Judge*, 57.

2. *Mandamus* may be proper remedy to compel county commissioners to pay an established debt, but is not the proper mode of establishing an unliquidated demand. *Cox vs. Commissioners of Whitfield Co.*, 741.

MARRIED WOMEN, See *Husband and Wife*.

MASTER AND SERVANT. See *Contracts*, 33, 34, 35.

MINOR. See *Estoppel*, 4; *Infancy*, 1, 2; *Prescription*, 3.

MISTAKE. See *Equity*, 7.

MORTGAGE.

1. Partnership name, mortgage made in, to secure partnership note, if signed by all the members individually, is a conveyance both from the partnership and its members individually, and may be enforced against one, more or all of them; if, however, it be made and signed in partnership name, but only by one partner, unless such act be expressly authorized or ratified subsequently by the co-partners, it binds only his own interest in the property. *Printup Bros. vs. Turner*, 71.
2. Personalty, mortgage on, must be foreclosed in the county where the mortgagor resides, if in the state, and this should appear by the record. *Rich vs. Colquitt, governor*, 113.
3. Personalty, execution based on mortgage improperly foreclosed, claiming proceeds of sale of part of personalty under another *fi. fa.*, new foreclosure, or an amendment of the original proceeding therefor by inserting allegation of jurisdiction, would leave mortgage without a *fi. fa.* when the property was sold, and prevent execution from taking fund. *Ibid.*
4. Absolute deed from debtor to creditor to the land, or payment of a given sum at a certain time, which agreement is canceled and renewed from year to year, does not constitute a mortgage which can be foreclosed at law, but resort must be had to equity. *Bateman et ux. vs. Archer*, 271.
5. Power of sale on default, does not survive the mortgage and take precedence of dower, year's support, expenses of admin-

strator, trust debts, etc. *Lathrop & Co. vs. Brown, executor*, 312.

6. That part of money was used to purchase property mortgaged to secure it makes no difference, there being no agreement as to it. *Ibid.*
7. Equitable plea to ejectment brought under deed, and it is decreed to be a mortgage, it is a lien from its date, and a junior deed is subject thereto. *Carter, administrator, vs. Monroe et al.*, 542.
8. Description of mortgaged property in mortgages executed in 1879, as follows, "as an advance on my crops of cotton, corn, etc., growing and to be grown in the year 1879, the same being now planted, to enable me to make my said crops, and I do hereby give them a mortgage upon all of my said crops to take effect as soon as my crops are planted," nearly all of said crops being then planted, sufficient. *Crine vs. Tifts & Co.*, 644.

See *Injunction* 6.

MUNICIPAL CORPORATION. See *Corporations*; *Trusts*, 3, 4.

#### NEGLIGENCE.

1. Statute makes certain act bearing materially on case imperative on the defendant's agents, court may instruct jury that diligence required such act. *Atlanta and West Point Railroad vs. Wyly*, 120.
2. Contributory negligence, and apportionment of damages, doctrine of. *Ibid.*
3. Railroad train, cow killed by, negligence is presumed, and in absence of sufficient evidence to rebut, verdict for plaintiff right. *Western & Atlantic Railroad vs. Steadly* 263.
4. Collaterals in shape of notes, or like evidences of debt, diligence in collection must be shown. If stock, diligence does not require it to be sold on default of debtor, and subsequent depreciation will not relieve debtor, he not having demanded sale. *Colquitt & Baggs vs. Stultz*, 305.
5. That new stock was issued to creditor makes no difference, it being still held as collateral. *Ibid.*
6. Train which has temporarily stopped before reaching regular depot, boarded by one in search of wife and child, passengers thereon, who steps off said train into a culvert unseen by him because of darkness, and is seriously injured, railroad



is not liable, even though the lights in some of cars were blown out by drunken passengers. The injuries might have been avoided by ordinary care. *Stiles vs. Atlanta & West Point Railroad*, 370.

7. Disregard by railroad of the requirements of the law as to crossings may be considered by jury in determining whether or not an accident, occurring just beyond crossing, was occasioned by negligence of railroad employés. *Western and Atlantic Railroad vs. Jones*, 631.

See *Railroads*, 12.

#### NEW TRIAL.

1. Vacation, motion cannot be heard in, except by order passed in term time and only at the time and place named therein, unless hearing is continued on showing then and there made. *Walker vs. Banks et al.*, 20.
2. Evidence sufficient to sustain verdict, new trial refused. *Smith, governor, vs. Banks et al.*, 26; *Willis et al. vs. Foster, trustee*, 82; *Phillips vs. Lindsey*, 139; *Rush, adm'r, vs. Ross, adm'r*, 144; *Ludden & Bates vs. Morrow*, 232; *Lyon et al. vs. Gray, adm'r, et al.*, 303; *Ransom & Co. vs. Roberts; Eskridge vs. Barrow*, 304; *Newman vs. Reagan*, 512; *Crawford vs. Jones*, 523; *Einstein, Eckman & Co. vs. Butler*, 561; *Freeman, executor, vs. Bigham*, 580; *Ladd vs. McDonald*, 665.
3. Second motion for new trial can only be entertained after the refusal of the first has been affirmed by the supreme court, when it presents such "an extraordinary motion or case" as is specified in Code, §3721. Such "motion or case" is one that does not ordinarily occur in human transactions. *Cox, relator, vs. Hillyer, Judge*, 57.
4. Discretion of judge in the first grant of a new trial not controlled unless some principle of law is misconstrued or misapplied in making such grant. *Plant vs. Eichberg*, 64.
5. Charge was a fair exposition of the law, and the verdict not unsupported by evidence, new trial refused. *Johnson vs. State*, 94.
6. Trial term of a criminal case order allowing time to perfect motion for new trial allowed, and said case is called at the next term, and the grounds of said motion have not yet been approved, a dismissal is proper. *Ross vs. State*, 127.
7. Evidence indicates defendant to be over fourteen years old, and shows his capacity to distinguish between right and wrong,

- also bad character and temper, refusal of new trial sustained. *Paul vs. State*, 147.
8. Charge, verdict contrary to, new trial granted. *Thornton, ordinary, vs. Willis, trustee*, 184; *Jordan vs. Jordan*, 351.
  9. Evidence rejected could not change result, its rejection is no cause for new trial. *Daniel vs. State*, 199.
  10. Case not having been fairly submitted on the question of fraud, new trial ordered. *Williams & Co. vs. Hart*, 201.
  11. Entry of judge on a brief of evidence, that he recollected certain portions of it as correct, but that from lapse of time before presented he was unable to state whether or not it was a correct brief, is not sufficient approval. *Brown, adm'r, vs. Groover, Stubbs & Co.*, 238.
  12. Inability of judge to approve brief of evidence caused by laches of movant, motion for new trial will be dismissed. *Ibid.*
  13. Newly discovered evidence, though this court would not have opened judgment on account of, deeming party negligent, yet it will not control discretion of court below so doing. *Wakefield vs. Moore, sheriff, et al.*, 268.
  14. Newly discovered evidence impeaching state's witness no ground for new trial. *Shelton vs. State*, 303.
  15. Juror, the son of first cousin of successful party to suit, relationship not being discovered until after verdict, ground of new trial. *Moody vs. Griffin*, 304.
  16. Questions in case not fully submitted and passed on, new trial granted. *Howard vs. Tucker et al.*, 323.
  17. Judge having a discretion refuses continuance, holding that he is bound by an inflexible rule of law, decision will be more readily reversed. *Brooks vs. State*, 330.
  18. Discussion of case on trial near jury, it appearing that they heard nothing that could have influenced verdict, no ground for new trial. *Brown vs. State*, 332.
  19. Charge on the whole correct, new trial refused although minor inaccuracies exist. *Ibid.*
  20. Grounds of motion for new trial should be made correct in themselves before granting rule *nisi*, without reference to general charge. *Ibid.*
  21. Testimony derived from witness, also a party, by his refreshing his memory after trial from books accessible before, is not newly discovered, and is no ground for new trial. *Richards vs. Hunt, Rankin & Lamar*, 342.

22. Non-suit improperly denied, necessary proof to make out case afterwards made, error no ground for new trial. *Rockdale Paper Mills vs. Stevens*, 380.
23. Juror heard remark of plaintiff's counsel, without his knowledge, that he had been down several times about these cases, and hoped to get through with them, no ground for new trial. *Ibid.*
24. Verdict too large ordered written off, or new trial granted. *Ibid.*
25. Verdict not contrary to evidence, new trial refused, although solicitor-general stated that he thought its grant would advance ends of justice. *Stodghill vs. State*, 422.
26. Decree had against one of two defendants for money, and that certain mortgages held by the other against complainant be as to him satisfied, and the defendant against whom money decree is had moves for, and obtains a new trial, the other defendant not joining in or filing a motion, the grant of new trial as to the one did not affect the decree as to the other, and said mortgages will not take funds arising from property which they covered as against a junior judgment against the mortgagor, *Willingham vs. Field*, 440.
27. Verdict right, although charge partly wrong, new trial refused. *DeLaigle vs. Denham*, 482.
28. Counsel in argument travel outside of case, the court's attention not being called thereto during trial, no ground for new trial. *Young vs. State*, 525.
29. Refusal to charge request which, if correctly given, could not have affected the verdict, no ground of new trial. *Carter, adin'r, vs. Monroe et al*, 542.
30. Motion for new trial set for hearing during a certain session of court, and being heard then, the court can hold up its decision to consider case, without an order for that purpose. *Powell vs. State*, 707.

#### NON-SUIT.

1. Evidence introduced by plaintiff sufficient to sustain verdict, non-suit should not be granted. *Burnam vs. McVaughn, for use*, 309.
2. Although non-suit be improperly denied, necessary proof to make out case afterwards made, error no ground for new trial. *Rockdale Paper Mills vs. Stevens*, 380.

3. Action on account not transferrable by parol, in name of original owner for use, that the usees could not sue in their own names is no ground for non-suit. Defendant cannot be hurt by the addition of usees. *Cross vs. Johnson, for use, 717.*

NOTICE.

1. Vendee from vendor with apparently absolute title, protected from a trust sought to be set up if he shows that he had no notice that trust funds went into property. That he had knowledge that vendor had mingled trust funds with his own insufficient. Onus of identifying trust property is not on purchaser, if innocent. *Hathorn et al. vs. Maynard, 168.*
2. Partners may dissolve by consent, but to relieve retiring partner from future liability, actual notice of dissolution must be given to persons who have dealt, and continue to deal, with firm on the faith of his membership therein, especially when firm's name is unchanged, notice by publication, especially in a paper not circulating in vicinity of residence of such person, without more, is not sufficient. *Richards vs. Butler & Carroll, 593.*
3. Purchaser from trustee had notice of trust, but also that his grantor held the claim which bound the trust estate, and received trustee's deed under an order of chancellor, conveying portion of trust estate, he would stand on the same footing as a purchaser without notice. *Iverson, trustee, et al. vs. Saulsbury, trustee, et al., 724.*  
See *Evidence, 38; Title 5,*

NUISANCE. See *Injunction, 1.*

OFFICERS. See *Sheriff, 3.*

ORDINARY. See *Jurisdiction, 5, 8.*

PARENT AND CHILD. See *Actions, 1.*

PARTNERSHIP.

1. Deed to land made to partners in the firm name, they hold as tenants in common. *Printup, Bros. & Co. vs. Turner, 71.*
2. Partnership in the firm name make promissory note and secure it by mortgage on such land, using the firm name in the mortgage, but each partner signing the same is a conveyance from the firm and also from its members individu-

ally, and may be foreclosed against one, more or all of them. *Ibid.*

3. One partner cannot, by deed or mortgage, convey partnership land, though conveying in partnership name and to secure a legitimate partnership debt, without the authority or subsequent ratification of his copartners. Such instrument conveys his individual interest and if a mortgage, can be foreclosed as to it. *Ibid.*
4. Action against copartners, or survivors of a partnership, all members need not be declared against nor need process be prayed against them, and a return of *non est inventus* made as to those not served, in order to bind their interest in the partnership assets; in either case the judgment binds those served individually and all the partnership property. *Ibid.*
5. Firm name continued with consent of retiring partner, creditor dealing with firm after change, with no notice, on faith of the old partner, though he may not credit them until after change, retiring partner is bound to him and estopped from denying partnership. *Richards vs. Hunt, Rankin & Lamar, 342.*
6. Retiring partner, to relieve from future liability actual notice of dissolution must be given to persons who have dealt, and continue to deal, with firm on the faith of his membership therein. Notice by publication, especially in a paper not circulating in vicinity of residence of such person, without more, is not sufficient. *Richards vs. Butler & Carroll, 593.*
7. Net profits to be divided, and no agreement as to losses, constituted partnership before Code. *Huguley vs. Morris & Tumlin, 666.*

PATENT-RIGHTS. See *Libel, 1.*

PENITENTIARY. See *Injunction, 4.*

PLEADINGS.

1. Breach of covenant, recovery sought on omitted agreement; omission by fraud, accident or mistake, and that one or both parties intended insertion, must be alleged. *Porter & Mumford vs. Gorman, 11.*
2. General or special demurrer to a bill in equity should be filed and disposed of at the first term. If an amendment is made, a demurrer may be filed to the new case then made. *Barnett et al. vs. People's Bank of Newman, 51.*

3. Husband and wife both sued, and the wife appears and pleads, a plea filed by her husband for her will be stricken, it not appearing that she resides out of the county. *Brent vs. Mount*, 92.
4. Assault with intent to murder one and homicide of another, committed at same time and place, an acquittal of defendant of the homicide will not be good plea in bar on the trial for the assault; certainly not where the killing and the assault occurred at different places. *Johnson vs. State*, 94.
5. Maker of note agreed not to plead failure of consideration unless he should give written notice to holder by July 1st, such plea, in a suit after that date, should allege such notice, or it will be demurrable. *Chapman vs. Skellie*, 124.
6. Such plea, not being sworn to, is demurrable. *Ibid.*
7. Purchase money of land, notes for sued on; plea that land was bought by plaintiff, an administrator, at his own sale; that defendant knew that fact, but not its legal effect, when he bought, nor that his vendor had not paid for the land or settled with the heirs, nor that he is insolvent; that defendant has paid part, and will pay rest of purchase money, if heirs will confirm sale, or he will give up land; it not appearing that administrator's securities are insolvent, or that defendant has been or ever will be disturbed in his enjoyment of land, plea demurrable. *Hancock vs. Cloud*, 209.
8. County, declaration against for any claim, whether founded on contract or tort, must aver that same had been presented to the ordinary for auditing within twelve months from time it accrued. *Maddox vs. County of Randolph*, 216.
9. Usury, plea setting up right to on notes in suit, only authorizes recovery of that, although usury may have been paid on other notes between same parties, and charge of court should so restrict claim. *Haywood vs. Lewis, ex'r*, 221.
10. Tort for which damages are claimed felonious, plaintiff must allege and prove prosecution before or at the time of commencing suit, or concurrent therewith, which means *pendente lite*, or a valid excuse for the failure to prosecute. *Western and Atlantic Railroad vs. Sawtell*, 235.
11. Demurrer to pleadings, court looks alone to law arising thereon, without considering matter *aliunde*. *Seibels vs. Hodges*, 245.
12. Remaindermen sued the administratrix of life-tenant, alleging his receipt of life estate in money, his death, and her refusal to pay, and the evidence sustained the allegations, non-suit properly refused. *Phillips, adm'r, vs. Crews et al.*, 274.

13. Contract and intention of both parties was to simply transfer contract, and not to bind landlord as indorser, and asking reformation, but not alleging fraud, accident or mistake in using "indorse," plea demurrable. *Smith vs. Brooks*, 356.
14. Set-off, plea of, should plainly set forth plaintiff's liability; averment that said liability is for money "placed in his hands" on certain day, insufficient. *Tillman, et al. vs. Morton*, 386.
15. Amendment stating that sum claimed was paid by defendant on a note, not knowing it to be without consideration, does not aid plea. It should show the want of consideration and defendant's ignorance. *Ibid.*
16. Usury, plea of must set out its amount, date, etc. *Ibid.*
17. Money rule, parties to claim individually, and the proof shows that whatever rights they have arise in representative capacities, the pleadings should conform to the proof before the same is awarded to either. *Morgan vs. Morgan*, 493.
18. Account not transferable by parol, suit brought on in name of original owner for use; that the usees could not sue in their own names is no ground for non-suit. The defendant cannot be hurt by the addition of the use clause. *Cross, vs. Johnson, for use*, 717.
19. Suit may be brought in this state on any written promise by attaching a copy to the declaration, without setting out therein the stipulations of the contract, in order to introduce it in evidence. *Couch, adm'r, vs. Couch*, 748.

See *Criminal Law*, 5; *Homestead*, 17.

#### POSSESSORY WARRANT.

1. Title obtained by fraud, and possession is with owner's consent, the writ does not lie, even though the consideration be tendered back. *Amos vs. Dougherty*, 612.
2. Chattel exchanged for another, even though false representations may have been made in negotiation leading to the trade, possessory warrant not proper remedy. *Welborn vs. Shirley*, 695.

POSSESSION. See *Ejectment*, 3.

#### POWERS.

1. Sale, power of, can be exercised only in the mode and on the conditions prescribed by the instrument. *Berrien, trustee, et al. vs. Thomas*, 61.

2. Survive grantor's death, for power to sell realty to, must be coupled with an interest in the thing sold, and not alone in the proceeds of sale. *Lathrop & Co. vs. Brown, executor, et al.*, 312.
3. Mortgage with power of sale on default, did not vest such power as would survive the mortgagor and take precedence of dower, year's support, expenses of administrator, trust debts, etc. *Ibid.*
4. That part of money was used to purchase property mortgaged to secure it, makes no difference, there being no agreement to that effect. *Ibid.*

#### PRACTICE IN SUPERIOR COURTS.

1. Vacation, motion for new trial cannot be heard in, except by order passed in term time. *Walker vs. Banks et al.*, 20.
2. Order designating time and place of hearing, authority restricted thereto, unless hearing is continued for cause then and there shown. *Ibid.*
3. Demurrer to bill in equity, it and its exhibits are alone considered. *Waters et al., executors, vs. Perkins*, 32.
4. Preliminary investigation to decide on admissibility of confession, jury should be sent out of hearing. *Hall vs. State*, 36.
5. Refusal of new trial in a criminal case affirmed by the supreme court, no second bill of exceptions can be allowed except on an extraordinary motion, as specified in Code, §3721. *Cox, relator. vs. Hillyer, judge*, 57.
6. "Extraordinary cases" are those which do not ordinarily occur in the transaction of human affairs. *Ibid.*
7. Cumulative evidence, though newly discovered, does not constitute "an extraordinary case." *Ibid.*
8. Question of law arising under a given state of facts to be submitted to judge for decision, it cannot be error to state what the facts are upon which question arises. *Caldwell et al. vs. McWilliams*, 99.
9. Ruling of court pending suit would work serious injury to party, *supersedeas* to said order should be granted until final disposition of main cause. *Marks vs. Hertz*, 119; *Southern Ex. Co. vs. Lynch*, 240.
10. Consent order passed allowing defendant's counsel time in which to perfect motion for new trial; when the case was



- called at the next term, the grounds not being then approved, dismissal was proper. *Ross vs. State*, 127.
11. Preliminary examination to introduction of secondary evidence left largely to presiding judge, and where he admits secondary evidence, his discretion will not be controlled unless clearly abused, *Phillips vs. Lindsey*, 139.
  12. Evidence announced closed, and court adjourned until next morning, when plaintiff offered answers of witness examined on the preceding day by defendant, to interrogatories, to contradict her oral testimony, it not appearing that she was then in court, or any foundation had been laid to impeach her, the discretion of the court excluding said answers will not be interfered with. *Rush, adm'r, vs. Ross, adm'r*, 144.
  13. General charge covers the law, special instructions, if desired, should be asked. *Ibid.*
  14. Counsel arguing outside of testimony, court, on objection must settle what witnesses swore ; statement thereof by court is not expression of opinion as to evidence. What is sworn, testimony ; truth deducted therefrom, evidence. *Williams & Co. vs. Hart*, 201.
  15. Motion to dismiss because plaintiff's pleadings show no cause of action, may be made at any time. *Maddox vs. County of Randolph*, 216.
  16. *Scire facias* to revive dormant judgment, no order necessary to authorize. *Seibels vs. Hodges*, 245.
  17. Decree cannot be set aside on motion, but objection to remedy can be waived. *Cotton vs. Dudley, ex'r, et al.*, 252.
  18. Motion argued without objection and granted, objection to remedy thereby waived. *Ibid.*
  19. Decree *pro confesso* cannot be entered unless complainant, or his counsel in his absence, swears that facts charged are true, or that he is informed and believes that defendant would admit same in an honest answer. *Ibid.*
  20. Levy made and claim interposed, new levy without order withdrawing *fi. fa.* from claim papers, illegal ; that first levy is illegal, does not aid second. *State vs. Jeter*, 256.
  21. Rule absolute against sheriff is not final like a judgment, and can be renewed or annulled at the same or subsequent term, upon motion on showing made that sheriff was not in contempt. *Wakefield vs. Moore, sheriff, et al.*, 268.
  22. Will not ambiguous or uncertain, construction for the court, not for the jury. *Phillips, adm'r, vs. Crews et al.*, 271.

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23. Witness remaining in court after being put under rule, is not rendered incompetent. He may be liable for contempt. *Rooks vs. State*, 330.
  24. Prisoner's statement first calls attention to important fact, no error to allow state to then re-open case. *Duckett vs. State*, 369.
  25. Equitable pleas set up facts for jury to pass on, verdict covering those facts is sufficient, if it so decides the issues on trial that a decree may be moulded thereon. *Robinson et al. vs. Alexander et ux.*, 406.
  26. Practice of administering oath to twelve jurors at once preliminary to examination on *voir dire*, is commended, and not swearing jurors in chief until full panel obtained, not error. *Roberts vs. State*, 430.
  27. Distinct offenses charged in indictment, and no demurrer made, defendant may demand that the state elect on which it will proceed; if such offenses appear by the indictment, the election may be called for on its reading; if by evidence, on its introduction; it must be called for before defendant opens his case. *Gilbert vs. State*, 449.
  28. Verdict in a case *ex contractu*, brought in the superior court, for \$25.00 and "costs of suit," there being no plea of set-off, recoupment on payment pending suit, court should tax costs as in justice court, and order the balance to be retained out of the recovery. *Smith vs. Shaffer & Ham, for use, etc.*, 459.
  29. Suggestion of bankruptcy must be formally made in case pending in order to obtain stay in state court to await discharge. Knowledge in other cases, or personal knowledge of judge of bankruptcy, not sufficient. *Howard vs. Glover*, 466.
  30. Disagreement between defendant and attorneys, and they decline to appear in case when called, and he fails to respond, judgment against him will not be set aside because he expected them to suggest his bankruptcy and apply for a stay of case. *Ibid.*
  31. Juror not understanding statutory questions asked on *voir dire*, court may explain them. *Dumas vs. State*, 472.
  32. Talesmen summoned cannot be struck for cause because they formed part of an array of jurors to which a challenge had been sustained in same case. If the second panel was illegally summoned, the array should have been again challenged. *Ibid.*

33. Courts of common law, especially in Georgia, distributing money in hands of officers, act as courts of equity. *Morgan vs. Morgan*, 493.
34. Claim case, levy shows defendant in *fi. fa.* in possession; if the claimant does not assume burden of proof and proceed, and the plaintiff does by direction of the court, he is entitled to open and conclude. *James vs. Kiser & Co.*, 515.
35. Counsel in argument go outside of case, attention of court should be called thereto and a ruling invoked either to restrain counsel, or by a request to charge. It is too late to raise the point on a motion for new trial. *Young vs. State*, 525.
36. Judgment finally disposing of case should not be rendered on *certiorari* where issues of fact are involved, but case should be remanded for a new trial. *Sapp vs. Adams, sup't*, 600.
37. Amendment does not postpone the trial term. Matter of giving time or continuing rests in the court's discretion. *Mer. and Plan. Nat. Bank et al., vs. Trustees of Masonic Hall*, 603.
38. Account, no question of involved, reference to an auditor is improper. *Ibid.*
39. Plaintiff in execution may dismiss levy, without leave of court, after claim or other issue pending thereon, and a subsequent levy is good. *Ayers vs. Lamb*, 627.
40. Bill in equity not dismissed because remedy at law complete, when motion is made at trial term. *Belle Greene Mining Co. vs. Tuggle*, 652; *Iverson, trustee, et al. vs. Saulsbury, trustee, et al.*, 724.
41. Counsel may read and comment on law to jury in criminal cases. During argument he may invoke court's opinion on any principle involved, and court may rule upon it in his charge or at the time. *Powell vs. State*, 707.
42. Motion for new trial set for hearing during a certain session of court, and being heard then, the court can hold up its decision to consider case without an order for that purpose. *Ibid.*
43. Repetition again and again of that portion of charge favorable to the plaintiff, but not that favorable to defendant, is error. *Simms vs. Floyd*, 719.
44. Questions prepared by complainants' counsel and read in hearing of opposing counsel, latter should state specifically, and

not generally, that he objects to them, and when he agreed to state specific objections in argument, but fails to do so, the objections will not be considered. *Iverson, trustee, et al. vs. Saulsbury, trustee, et al., 724.*

45. Justice dismisses rule against constable answering that he had been notified to hold money to pay claim put in therefor, error, and on *certiorari* the superior court should remand the case instructing the justice to try it on its merits and decide it in conformity with facts. *Smith vs. Wade, 754.*
46. Counsel should not be allowed to argue facts not appearing from the testimony. *Wade vs. State, 756.*
47. Bailiff may be a witness and still retire with jury temporarily from court-room. *Ibid.*

See *Equity, 91.*

#### PRACTICE IN SUPREME COURT.

1. Exception on ground that court had no jurisdiction to render judgment complained of, not dismissed as complaining of a nullity. *Walker vs. Banks et al., 20.*
2. General demurrer to bill as originally brought and amended, overruled, court will consider case as presented in court below, although, by order of record, made four years previous to the judgment complained of, the bill was dismissed as to two defendants, their names not being stricken or the judge presiding otherwise notified that they were not parties. *Waters et al. vs. Perkins, 32.*
3. Final judgment, on bill by guardian for construction of will, and directions to administrator, praying that he be required to pay complainant until the final hearing an amount from the income for the ward's support and education, order requiring such payment is not, and writ of error thereto will be dismissed. *Ross, adm'r, et al. vs. Byrd, guardian, 41.*
4. *Mandamus* not issue to compel judge to certify second bill of exceptions in criminal case, after affirmance of refusal of a new trial therein, unless such second bill makes such "an extraordinary case" as is specified in Code, §3721. *Cox, relator, vs. Hillyer, judge, 57.*
5. Cumulative evidence, though newly discovered, not constitute "an extraordinary case." *Ibid.*
6. New trial not granted on ground that verdict is contrary to law, unless error is assigned on verdict. *Brent vs. Mount, 92.*

7. Grant or refusal of an injunction, "fast writ of error" lies to, but not to decree dismissing a bill on demurrer at chambers or in term. *Sheibley et al. vs. Ga. Southern R. R. Co.*, 107.
8. "Fast writ of error" brought, as in an injunction case, to dismissal of bill on demurrer, leave granted to withdraw to make it returnable to next term, thirty days from the chancellor's decision not having elapsed. *Ibid.*
9. Final judgment, order discharging defendant arrested in trover case on bail process on his own recognizance, the main case still pending, is not. *Marks vs. Hertz*, 119.
10. Costs, failure to pay, no excuse to clerk of superior court for delay in sending up case. *Hathorn et al. vs. Maynard*, 168.
11. Delayed case set to heel of docket under act of 1877, writ of error not dismissed on ground that by clerk's certificate delay was occasioned by plaintiffs in error, it appearing thereby that plaintiffs in error filed pauper affidavit only three days before he transmitted the papers, and had failed to pay costs. The reason stated in the certificate will be considered, and furnishing no excuse to the clerk for the delay, it was not caused by "consent," etc. of plaintiff in error. *Ibid.*
12. Question not made in court below not considered in supreme court. *Howard, ordinary, vs. Gray, adm'r*, 182.
13. Clerk sending up delayed case under act of 1877, may state cause of delay in his certificate, but *aliunde* evidence as to that fact is inadmissible. *Hancock vs. Cloud*, 208.
14. Verdict in favor of defendant and his securities on motion to enter up judgment on replevy bond to distress warrant, after verdict for plaintiff on the warrant, and bill of exceptions thereto served on only one of the securities, writ of error dismissed. *Maynard vs. Hunnewell, ex'r*, 281.
15. Service of bill of exceptions must affirmatively appear to have been made before judge's certificate. *Bush vs. Keaton, ex'r*, 296.
16. Judge's certificate must affirmatively appear to have been attached to bill of exception within thirty days from adjournment of court, or show that the delay was without fault of party complaining. *Ibid.*
17. Judge's certificate fails to state that bill of exception is true. it will be dismissed. *Lawrence & Pope vs. The Mayor, etc., of Monticello*, 298.

18. Defect not cured by fact that bill of exception contains nothing but assignment of errors upon grounds taken in motion for new trial, which record shows that judge had certified to be true. *Ibid.*
19. Grant or refusal of injunction, unless bill of exceptions thereto is transmitted to this court, with a transcript of the record, within fifteen days from date of its service, writ of error dismissed. *Smith et al. vs. Wheatley & Co. et al.*, 299.
20. Brief of evidence, interrogatories omitted therefrom, though they appear elsewhere in record, writ of error dismissed. *Turner vs. Wilcox, Gibbs & Co.*, 299.
21. Judge indorsing evidence, "revised and approved subject to corrections," unless it affirmatively appears that he subsequently finally passed upon such brief, correcting it if necessary, writ of error dismissed. *Ibid.*
22. Defects in record and in clerk's certificate to bill of exceptions, known to plaintiff in error in time to have corrected before case was called, suggestion of diminution not then allowed, and writ of error will be dismissed. *Neal vs. State*, 300.
23. Clerk's certificate to the bill of exceptions must state that it is the original. *Ibid.*
24. Grant of first new trial reluctantly interfered with; these cases show no abuse of discretion. *Collier vs. Leonard*; *Ware vs. Ware et al.*; *Wilson et al. vs. Archer et al.*; *Gentry vs. Cowan, McClung, & Co.*, 307.
25. Acknowledgment of service of bill of exceptions in which Eckles & Abercrombie are defendants in error, signed "Eckles and Abercrombie, per John T. Eckles," it nowhere appearing who John T. Eckles was, is insufficient. *Smith vs. Eckles & Abercrombie*, 326.
26. Costs in supreme court awarded against defendant in error, though judgment be affirmed with directions to write off portion of verdict. *Rockdale Paper Mills vs. Stevens*, 380.
27. Charge, whether verdict contrary to or not, cannot be considered, the charge not being sent up. *Halleman vs. Halleman*, 476.
28. Decision of this court may be reviewed and reversed, yet judgment in prior case so reviewed, not affected thereby. *Georgia Penitentiary Co. No. 2, et al., vs. Nelms, principal keeper, et al.*, 499.

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29. Bail-trover, defendant in excepting, need not make security on bail-bond a party to the bill of exceptions. *Crawford vs. Jones*, 523.
  30. Bill of exceptions must clearly show errors complained of, or writ of error dismissed. *Hays vs. Slade & Etheridge*, 570.
  31. Withdrawal of the rest of pleadings when the court strikes a portion, prevents an exception to such ruling. *Robinson vs. Veal et al.*, 592.
  32. Exceptions turning on evidences not considered where no brief is in the record. *Ibid.*
  33. Judgment, none in record, and the bill of exception shows one was rendered, decision will be delayed and the clerk required to certify and send up a copy thereof. *Sapp vs. Adams, sup't*, 600.
  34. Delay only, not sufficiently appear that writ of error was brought for, damages not allowed. *Mer. and Plant. Nat. Bank et al. vs. Trustees of Masonic Hall*, 603.
  35. Complainant not made a party to writ of error sued out by one defendant, on the dismissal from the case of his co-defendant, against whom complainant and he, by answer in nature of a cross-bill, pray relief, it will be dismissed. *Fowers vs. Baker*, 611.
  36. Judgment affirmed with damages where no good cause of exception shown and no appearance made for plaintiff in error. *Fields vs. Alley*, 637.
  37. Diminution of record, on suggestion, clerk sends up missing record covering evidence not originally embraced therein, such addition will be considered as a part of record. *Ladd vs. McDonald*, 665.
  38. Error assigned being that the court below should have granted a *certiorari* to the justice's judgment against a railroad for killing a cow, on the ground that the presumption against the railroad had been rebutted, the justice's answer is necessary to make such error appear to this court. *Georgia R. R. Co. vs. Fisk*, 714.
  39. Motion for new trial approved without qualification or reference to general charge, but the record shows what purports to be such charge, followed by an order dated the day the motion was approved and over twenty days after trial, stating that it is the substance of such charge and directing clerk to include in record, such charge can qualify the grounds of said motion. *Simms, executor, vs. Floyd*, 719.

40. Record so confused or imperfect that an alleged error cannot be passed upon, it will not be considered. *Wesley vs. State*, 751.

#### **PRESCRIPTION.**

1. Constructive possession, to constitute, under Code, §2681, actual possession of a part of the tract is necessary, whatever may have been the prior law. Such possession for seven years gives defendant a valid prescriptive title. *Anderson vs. Dodd*, 402.
2. Tenant in common acquires no prescriptive right by use of a way over the common property, all the tenants having undisputed use of the premises. Where all the tenants deeded away a certain lot, not reserving private way, the right passed by the deed, and one of them could not tack use of way before the deed, to use since, to complete his prescriptive title. *Boyd vs. Hand*, 468.
3. Will provided that after paying debts, etc., testator's remaining lands should be divided among certain legatees, the executor retaining title for purpose of executing will; prescription which began running against testator would continue running against the executor, unaffected by the minority of one of the legatees, until some step was taken to pass title to her. *Sparks vs Roberts*, 571.
4. *Feme sole*, after prescription began to run against, her marriage would not stop it. *Ibid*.
5. Married woman's act of 1866, as well as constitution of 1868 and act of 1872, removed disability of married woman as to bringing suit. *Ibid*.

**PRESUMPTION.** See *Negligence*, 4; *Promissory Notes*, 4; *Tax*, 3.

#### **PRINCIPAL AND AGENT.**

1. Unauthorized agent, one who receives and sells goods bought by, liable for purchase money. *McDowell vs. McKenzie*, 630.
2. Warranty of soundness, agent in respect to purchase and sale of negroes, may bind principal by, and settle dispute relative thereto by giving note. *Huguley vs Morris & Tumlin*, 666.

#### **PROMISSORY NOTES.**

1. Action on note, written instrument bad as a mortgage, may be part of contract in which it was given, follow its transfer and



- be admissible against the maker to show an agreement to pay counsel fees, and not to plead failure of consideration. *Chapman vs. Skellie*, 124.
2. Failure of consideration, maker of note agrees not to plead, unless he notifies holder in writing by July 1st, plea not alleging such notice, in a suit after said date, is demurrable. *Ibid.*
  3. Fertilizer is imported in casks, legally analyzed and inspected, and afterwards manipulated with other ingredients, and without further analysis or inspection, sold, a note given therefor is void, as based on an illegal consideration, even in hands of *bona fide* purchaser without notice and before maturity. *Johnston, Bros. & Co., vs. McConnell et al.*, 129.
  4. Presumption is that intestate paying notes in his lifetime would take them up. Nor is this presumption overcome by fact that notes are held by one of his administrators, if he be suing on same as executor of another estate, to collect them from the indorser, his co-administrator. *Haywood vs. Lewis, executor*, 221.
  5. Usurious, note for \$172.00, with twelve per cent. interest, given in 1876, for a loan of \$150.00, is, and works a forfeiture under act of 1875. *Lanier vs. Cox et al.*, 265.
  6. Short form, action on note against one individually, declaration not amendable by alleging same to have been given by executrix for money used for benefit of estate, under a provision in the will directing it to be kept together, especially when amendment was barred. *Lynch, adm'r, vs. Kirby, adm'r*, 279.
  7. Executor cannot bind an estate by a note given as such. *Ibid.*
  8. Indorser and payee of note, contract between distinct from that between payee and maker. *Freeman, ex'r, vs. Bigham*, 580.
  9. Purchase money of negro returned as unsound, note given by B in firm name of A & B therefor, under a warranty signed in partnership name by B, where A furnished negroes and money to pay for those B should buy, and B was to sell, pay expenses and divide profits, nothing being said as to losses, was binding on A, if not as a partner certainly as the principal of a duly authorized agent. *Huguley vs. Morris & Tunlin*, 666.
  10. Negotiability, notes without, held by a *bona fide* purchaser, are subject to equities and defenses existing between assignor and debtor at date of assignment. *Hamilton vs. The Grangers' Life and Health Insurance Co.*, 750.

## RAILROADS.

1. Minor children, by §2791 of Code, have right of action against railroad as well for the homicide of the mother as for that of the father. *Atlanta & West Point R. R. vs. Venable, next friend*, 55.
2. Statute making act imperative on railroad, court may instruct jury that diligence required it to be done. *Atlanta & West Point R. R. vs. Wyly*, 120.
3. Contributory negligence and apportionment of damages, doctrine of. *Ibid.*
4. Homicide a felony or misdemeanor, question is for jury, under instructions from the court as to what constitutes a felony. Homicide from collision of trains is *prima facie* felonious. The burden is on plaintiff to remove that presumption by proof; if he does not, it must appear that the criminal prosecution had taken place, or a sufficient excuse for failure must be shown. *Western & Atlantic Railroad vs. Sawtell*, 235.
5. Negligence is presumed against railroad where proof shows cow killed by train; presumption not rebutted, verdict for plaintiff right. *Western & Atlantic Railroad vs. Steadly*, 263.
6. Train which has temporarily stopped before reaching regular depot, boarded by one in search of wife and child, passengers thereon, who steps off into a culvert, unseen by him because of darkness, and is seriously injured, railroad is not liable, even though the lights in some cars were blown out by drunken passengers. The injuries might have been avoided by ordinary care. *Stiles vs. Atlanta & West Point R. R.*, 370.
7. Right-of-way, bill alleging that judgment on a writ *ad quod damnum* had been made in complainant's favor for property condemned as, the title thereto to vest in said company on payment of sum assessed, but establishing no special lien thereon; that pending these proceedings said railroad had become insolvent, was sold under decree to defendant, who was using said land as a part of its right-of-way, and praying injunction of such use until payment of sum assessed, and general relief, is not demurrable. Common law furnishes no remedy. *Gammage vs. Georgia Southern R. R.*, 614.
8. Disregard of the requirements of the law as to crossings, may be considered by jury in case of an accident just beyond a

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1. The first of these is the fact that the law of the United States is not binding on the courts of the United States. The second is the fact that the law of the United States is not binding on the courts of the United States. The third is the fact that the law of the United States is not binding on the courts of the United States. The fourth is the fact that the law of the United States is not binding on the courts of the United States. The fifth is the fact that the law of the United States is not binding on the courts of the United States. The sixth is the fact that the law of the United States is not binding on the courts of the United States. The seventh is the fact that the law of the United States is not binding on the courts of the United States. The eighth is the fact that the law of the United States is not binding on the courts of the United States. The ninth is the fact that the law of the United States is not binding on the courts of the United States. The tenth is the fact that the law of the United States is not binding on the courts of the United States.

3. Mortgage executed by defendant in *fi. fa.* to secure debt to claimant, and prior to rendition of plaintiffs' judgment, surrendered the mortgaged property to pay said debt, title passed though the possession never changed, and though no written conveyance was made until after the judgment; question of good faith was for the jury. *Weiller & Ellis vs. Johnston*, 743.

#### SCIRE FACIAS.

1. Dormant judgment, no order of court is necessary to authorize *scire facias* to revive. *Seibels vs. Hodges*, 245.
2. Barred, *scire facias* is after ten years from date of judgment on which no *fi. fa.* was issued, or if issued, no levy was made, and no steps taken to revive. *Ibid.*
3. Void judgment, *scire facias* not issue to revive. *Ibid.*

SERVICE. See *Judgments*, 16; *Lien*, 4.

#### SET-OFF AND RECOUPMENT.

1. New stock issued to creditor, but still held as collateral; plea of recoupment because of creditor's failure to sell, and subsequent depreciation, demurrable. *Colquitt & Baggs vs. Shultz*, 305.
2. Plea of set-off should plainly set forth plaintiffs' liability. Averment that said liability is for money "placed in his hands" on a certain day is insufficient. *Tillman et al. vs. Morton*, 386.
3. Plea of usury must set out usury, its amount, date and time. *Ibid.*
4. Amendment stating that sum claimed was paid plaintiff by defendant on a note, not knowing it to be without consideration, does not aid plea. It should state how such want of consideration and defendant's ignorance thereof happened. *Ibid.*
5. Recoupment as a defense must spring out of the contract sued on, and is confined to that; a claim wholly distinct cannot be recouped against a suit on a promissory note. *Hamilton vs. Grangers' Health and Life Ins. Co.*, 750.
6. Set-off extends to all mutual demands existing at the commencement of the action. Money procured by plaintiff from defendant by fraud, may be set off against a note for money loaned. *Ibid.*

## SHERIFF.

1. Limit sale, sheriff cannot by announcement made. He sells and purchaser buys according to the process and levy thereunder. *Frost vs. Render*, 15.
2. Levy tax *fi. fa.* for less than \$100.00 without first returning, "no personalty" thereon, sheriff may. *Plant vs. Eichberg*, 64.
3. Extra compensation, sheriff or his deputy must attend court and summon tales juror without. These duties are incidental to the office of sheriff. Practice of officers charging extra fees condemned. *Commissioners of Decatur County vs. Cox, sh'ff.*, 80.
4. Levy should state who was in possession, and entry is evidence thereof, but is not of who died in possession. Such last entry not relieve plaintiff in *fi. fa.* of onus. *Williams & Co. vs. Hart*, 201.
5. Execute and return final process, sheriffs failing to are liable in an action on the case or by rule, for the actual injury sustained. *Wakefield vs. Moore, sheriff, et al.*, 268.
6. Rule absolute against sheriff is not final and conclusive like a judgment. It is the dealing of the court with its defaulting officer, and can be renewed or annulled at the same or subsequent term, upon motion, on showing made that sheriff was not in contempt. *Ibid.*
7. Answer to rule for failure to make money on execution, showed that an illegality had been filed, setting up that execution did not follow judgment, which sheriff felt it his duty to accept, and asking time to get said illegality from the superior court of the county whence said execution issued, court's discretion refusing to make said rule absolute was properly exercised. *Perry vs. Christie, sheriff*, 642.

See *Actions*, 4; *Levy and Sale*, 5.

STATUTE OF LIMITATIONS. See *Limitations, Statute of*.

STOCKHOLDERS. See *Corporations*, 7, 8; *Equity*, 48.

STOPPAGE IN TRANSITU. See *Railroads*, 10, 11.

SUPERSEDEAS. See *Practice in Superior Courts*, 9.

SURETY AND INDORSER.

1. Execution of deed from debtor to creditor, either as payment or security, without proof of delivery or reception of property by

creditor, will not discharge surety. *Haywood vs. Lewis, ex'r, 221.*

2. Recognizance conditioned that the principal appear at specified term, appearance at time appointed discharged bond, and relieved securities from liability for non-appearance at subsequent term. *Colquitt, governor, vs. Smith et al., 341.*
3. Contract to pay landlord cotton as rent, and money for provisions advanced, was transferred by indorsement, "I hereby transfer, assign and indorse," the landlord was not a surety, but an indorser for value, and a plea that before debt became due, indorser notified holder to make money out of cotton then in tenant's hands subject thereto, which he afterwards disposed of, was demurrable, especially as notice failed to state county of principal's residence. *Smith vs. Brooks, 356.*
4. Bankruptcy of principal on bond for eventual condemnation money, if discharging him, discharges the surety. *Rountree et al. vs. Rutherford, administrator, 444.*

#### TAX.

1. Execution for less than \$100.00 may be levied on land without first making an entry of "no personalty." *Plant vs. Eichberg, 64.*
2. Recitals in tax deed are *prima facie* evidence of acts of officer making sale, but not of his authority to sell. *Shackleford vs. Hooper et ux., 344.*
3. Large amount of property sold for taxes at much less than value, not raise presumption that levy was excessive and sale void. *Ibid.*
4. Execution for taxes issued by the comptroller-general against a tax collector and his sureties, cannot be arrested by affidavit of illegality. *Manning vs. Phillips, 548.*

#### TORTS.

1. Felonious, tort for which damages are claimed being, plaintiff must allege and prove prosecution before, or at the time of commencing suit or concurrent therewith, which means *pendente lite*, or a valid excuse for the failure to prosecute. *Western & Atlantic Railroad vs. Sawtell, 235.*
2. Homicide a felony or misdemeanor, question for jury under instructions from court as to what constitutes a felony. Homicide from collision of trains is *prima facie* felonious, and

- the burden of proof is on plaintiff to remove that presumption before it can be reduced to a misdemeanor. *Ibid.*
- 3. Municipality is not bound for tort of police officer, especially when not acting as such. *McElroy vs. City Council of Albany*, 387.

## TROVER.

- 1. Writ of error does not lie to discharge of defendant in trover, arrested under bail process, on his own recognizance, whilst case is still pending. *Marks vs. Hertz*, 119.
- 2. Bail-trover, where an alternative verdict for money has been found, to be discharged by delivery of property in twenty days, when the defendant fails so to deliver, verdict becomes absolute for money. Therefore further imprisonment under bail-process would be for debt, and hence unconstitutional. *Southern Express Co. vs. Lynch*, 240.
- 3. Receipt of bill of lading, paying freight and letting kegs remain at depot, was a possession by purchaser, and his refusal to return on demand was a conversion. *Hare vs. Atlanta City Brewing Co.*, 348.
- 4. Fraud in exchange of personalty, party defrauded may sue on warranty or bring trover. *Dawson vs. Pennaman*, 698.

## TRUSTS.

- 1. Power of sale on the written consent of the beneficiary, trustee can only sell on such consent, being first obtained in writing. *Berrien, trustee, et al. vs. Thomas*, 61.
- 2. Purchaser with notice, from executors who bought the property sold, fraudulently, at their own sale, is liable only for what he buys, and not to the same extent as the executors. *Willis et al. vs. Foster, trustee*, 82.
- 3. Municipality issued \$30,000.00 of bonds, and contracted with broker to give him use of \$7,500.00 of them, if he would keep an equal amount at par as a circulating medium and redeem them when presented, the other \$7,500.00 to be returned to the town when it should redeem \$7,500.00, and the broker became bankrupt, having on hand \$4,900.00 of said bonds; in a contest for the possession thereof between the town and the assignees in bankruptcy, the former should recover, such contract creating a trust in the nature of a bailment. *Cabaniss et al., assignees, vs. Ponder, mayor, et al.*, 134.

4. Immaterial that bonds in dispute are not the identical ones delivered to the bankrupt by the town. The contract contemplated the use of the entire issue, and a return in kind. *Ibid.*
5. Vendee from vendor with apparently absolute title, protected from a trust sought to be set up, if he shows that he had no notice that trust funds went into property; that he had knowledge that vendor had mingled trust funds with his own, insufficient; *onus* of identifying trust property is not on purchaser, if innocent. *Hathorn et al. vs. Maynard, 168.*
6. Deed conveys four-sevenths of land in trust to one party and three-sevenths not in trust to another, error to instruct jury that they may find all was trust property, regardless of the deed. *Ibid.*
7. Vendee may rely on vendor's assurances that no trust funds are in the property bought, if he acted thereon as a prudent man. *Ibid.*
8. Purchaser without notice from trustee who had mingled his and his *cestuis que trust* funds, acquires title to property of which trustee was apparently the owner. Purchaser need not show that the property left was enough to settle with the *cestuis que trust*. *Ibid.*
9. *Cestuis que trust*, fully paid by conveyance to them of property of equal value with original amount received, cannot recover. *Ibid.*
10. Minor beneficiary of trust property illegally sold, after attaining majority, repudiated sale and brought ejectment for lot, bill to enjoin the same, claiming compensation for improvements innocently placed thereon by purchaser, would not be without equity. *Iverson, trustee, et al. vs. Saulsbury, trustee, et al., 724.*
11. Chancellor at chambers has jurisdiction to order sale of part of trust estate to pay debt which was an incumbrance on whole estate, the *cestui que trust* assenting and all parties having notice and being represented. *Ibid.*
12. Purchaser with notice of trust, but also of fact that grantor held the claim which bound the trust estate, receiving trustee's deed, under an order of chancellor, conveying portion of trust estate, would stand in equity on same footing as a purchaser without notice. *Ibid.*
13. Beneficiaries of trust property illegally sold, who for years have seen the purchasers erecting valuable improvements thereon



without objection, are estopped from setting up title thereto. *Ibid.*

14. Would a minor old enough to understand his rights be estopped by like conduct? *Quære. Ibid.*
15. Equity has jurisdiction to settle a trust estate; that a court of law has concurrent jurisdiction will not oust that of equity, especially where fraud is charged. *Park vs. Park, 746.*
16. Will provide that executor should keep money and property bequeathed to minor until her majority, free from liability for hire or interest, bill by the legatee, after she came of age, for account and settlement, charging fraudulent use of the funds by executor, was not demurrable for want of equity. *Ibid.*

USURY. See *Interest and Usury.*

VENUE. See *Jurisdiction, 10.*

#### VERDICT.

1. Impeach verdict, jurors cannot; much less will it be set aside on affidavit of party as to what jurors told him. *Smith, governor, vs. Banks et al., 26.*
2. Reasonable interpretation of verdict for the plaintiffs for an amount, would be, a finding against the defendants who were made parties to that case, and no other. *Saulsbury, Respess & Co. vs. Blandys, 45.*
3. Illegal, though verdict may be, yet where no error based thereon is assigned, a new trial will not be granted. *Brent vs. Mount, 92.*
4. Suit was brought for purchase money of land in 1866, to which defendant filed a plea under the relief act of 1868, and a verdict was rendered, when it does not appear, "for the plaintiff the return of the land." A judgment was entered on this verdict in 1870, that plaintiff recover of defendant certain described land which the latter had bought of him. Such verdict and judgment are not void for uncertainty. *McWilliams vs. Walthall et al., executors, 109.*
5. Bail-trover, where an alternative verdict for money has been found, to be discharged by delivery of the property in twenty days; where the defendant fails so to deliver, verdict becomes absolute for money. *Southern Express Co. vs. Lynch, 240.*
6. Excess of verdict which is too large ordered written off. *Richards vs. Hunt, Rankin & Lamar, 342; Jordan vs. Jordan, 351; Rockdale Paper Mills vs. Stevens, 380.*

7. Where equitable pleas set up facts for jury to pass on, a verdict covering those facts is sufficient if it so decides the issues on trial that a decree may be moulded thereon. *Robinson et al. vs. Alexander et ux.*, 406.
8. Equity being done by upholding verdict, supported by testimony, with directions, it is so ordered. *Ibid.*
9. Alimony, verdict for, is not illegal because it does not provide for payment of husband's debts; they may be considered in determining if verdict is excessive. *Halleman vs. Halleman*, 476.
10. Contrary to law and inconsistent with itself, verdict set aside. *Hall, administrator, vs. Spivey*, 693.

#### WAIVER.

1. Benefits taken under a contract without objection, with knowledge that same has been broken by other party, waives breach. *Cabaniss et al., assignees, vs. Ponder, mayor, et al.*, 134.
2. Decree cannot be set aside on motion, but objection to remedy can be waived. *Coston vs. Dudley, executor, et al.*, 252.
3. Motion argued without objection and granted, objection to remedy waived. *Ibid.*
4. Justice of district of defendant's residence disqualified, and suit brought for less than \$100.00, and tried on merits before justice of another district, without objection, judgment for plaintiff was valid. *Dozier vs. Allen*, 255.
5. Justice court trying a demand of over fifty dollars, in 1872, at the time named in a summons made returnable in less than twenty days from date, was without jurisdiction, and defect could not be waived. *Thurston et ux. vs. Wilkerson*, 557.
6. Appearance by counsel for defendant and action taken in the case, as shown by bench docket, though no plea filed and the judgment is by default, will waive a service only fourteen days before the term of the superior court to which the process is returnable. *Lowe, guardian, vs. Burkett*, 564.

See *Homestead*, 17.

WARRANTY. See *Trover*, 4.

WAY. See *Prescription*, 2.

WESTERN & ATLANTIC RAILROAD. See *Contracts*, 16.

## WILLS.

1. Construction for court where will is not ambiguous or uncertain. *Phill ps, adm'x, vs. Crews et al.*, 274.
2. All parts of will must be taken together and given effect ; if impossible, the last prevails. *Ibid.*
3. Testator died leaving will disposing of one-half of residue of estate, after certain specific bequests on certain trusts, with remainder over, and after his death the United States granted certain other lands to his heirs and legal representatives ; such land did not pass under the will ; the heirs and legal representatives took under the grant. *Ware et al. vs. Trustees of Emory College et al.*, 283.
4. Retained, will did not intend that money should be, for purpose of equalization on death of widow, but that that should be done by inter-payments among legatees. *Summerlin et al., adm'rs, vs. Dorsett, adm'r*, 397.

## WITNESS.

1. Purchase money paid by complainant's father, but the deed made to complainant's husband, and he is dead ; on a bill to reform deed brought by the wife and daughter against the vendor and her deceased husband's administrator, and to declare it a trust for her benefit, the father who paid the money is competent witness to prove instructions he gave son-in-law as to manner of taking title, while the latter was acting as his agent. *Davis, adm'r, et al. vs. McLester*, 132.
2. Conclusion as to agreement should be excluded, yet after stating facts of the transaction, witness may give his understanding of it as he heard it from the parties. *Phillips vs. Lindsey*, 139.
3. Maker's wife is competent to testify that she paid note for husband, although payee is dead. *Rush, adm'r, vs. Ross, adm'r*, 144.
4. Deeds to the same property made to two different persons by same grantor ; in an action of ejectment between the two chains of title, he is a competent witness to show that first deed was without consideration, and to avoid payment of debts, although first grantee is dead. *Allen et al., vs. Davis*, 179.
5. Rule, in putting witnesses under, safe to swear them and send them out of hearing, but witness remaining not rendered incompetent ; may be liable for contempt. *Rooks vs. State* 330.

6. Jurisdiction, witness out of, general rule is that a continuance will be refused ; but where witness has promised, and is reasonably expected, to attend in reasonable time, and his testimony is material, diligence being shown, continuance or postponement should be allowed. *Brown vs. State*, 332.
7. Compensation of \$2.00 per day to witnesses attending out of county of residence, applies only to superior court. *Commissioners of Floyd County vs. Black*, 384.
8. Party to issue dead, other is incompetent as to what passed between them, or as to what was reported to her as coming from deceased. *Robinson et al. vs. Alexander et ux.*, 406.
9. Prosecutrix cannot be asked as to statements made to an attorney in contemplation of his employment. If she voluntarily testify as to part of her conversation with him on direct examination, other side may inquire concerning the entire conversation. If she refuse to answer as to any part, as tending to criminate her, the whole should be excluded. *Young vs. State*, 525.
10. Party to cause of action may testify as to contract between himself and agent of other, though principal be dead, the agent being alive, but cannot testify to statements of deceased repeated by said agent touching a past contract between the principals. *Freeman, executor, vs. Bigham*, 580.
11. That agent subsequently became deceased's executor, and a party to the suit, does not alter case ; he was not a party to the contract. *Ibid.*
12. Indorser and payee of note, contest between, in no way affecting maker's liability, maker competent witness though payee was dead ; maker no party to contract between indorser and payee. *Ibid.*
13. Impeach his own witness, party cannot generally, but may contradict his testimony by other witnesses. *Cronan vs. Roberts & Co.*, 678.













